342·42
Con/Con
27631

00027631

Digitized with financial assistance from the
Government of Maharashtra
on 02 January, 2016

CONVERSATIONS

ON THE

ENGLISH CONSTITUTION.

27631

LONDON:

PRINTED FOR

LONGMAN, REES, ORME, BROWN, AND GREEN,

PATERNOSTER-ROW.

1828.

342.42
Con/Con
27631

CONTENTS.

CONVERSATION I.

HISTORICAL SKETCH. — FROM THE CONQUEST TO THE REIGN OF EDWARD I.

The Conquest. — State of England. — Power of the king. — Commune Concilium. — Establishment of the Feudal System. — Explanation of the system — its effects. — WILLIAM RUFUS. — HENRY I. — his charter. — State of the constitution to the reign of JOHN. — Tallages. — RICHARD I. — JOHN. — Magna Charta, — HENRY III. — his extortions — his quarrels with the barons. Provisions of Oxford. — State of the prerogative. — In whom the legislative power was vested. — Origin of the representative system. — Forest laws. — Administration of justice — fines — purveyance. — Progress of the constitution. Page 9

CONVERSATION II.

HISTORICAL SKETCH. — FROM THE REIGN OF EDWARD I. TO THAT OF HENRY IV.

EDWARD I. — Confirmatio chartarum. — The charters not well observed. — EDWARD II. Jealousy of parliament. — Lords ordainers. — Their power abolished. — Despotism of Edward II. — EDWARD III. — Complaints of the commons. — Appropri-

tion of supplies. — The commons consulted on matters of state. Taxes without assent of parliament. — Form of statutes. — RICHARD II. — Commons enquire into the application of supplies. — Complaints of the commons. — Insurrection of the villeins. — Commons withhold the supplies. — Richard strengthens his authority. — Impeachment of De la Pole. — Commission of reform. — Richard attempts to secure a parliament in his favour. — Procures an illegal opinion from the judges. — Impeachment of the king's advisers and the judges. — Richard grows more powerful. — Haxey's case. — Banished judges restored. — Another commission appointed. — Richard's misconduct. — Hereford. — Richard deposed. — HENRY IV. Page 38

CONVERSATION III.

HISTORICAL SKETCH. — FROM THE REIGN OF HENRY IV. TO THAT OF HENRY VIII.

Character of the reign of HENRY IV. — Removes officers of his household on request of the commons. — Appropriation of supplies. — Descent of the crown settled in parliament. — Act for freedom of elections. — Debates of commons not to be disclosed to the king. — Commons bring forward articles for the regulation of the kingdom. — The king more peremptory with the commons. — No instances of illegal taxation. — HENRY V. — Loan on security of parliament. — Parliament consulted on affairs of state. — Arbitrary practices. — Subsidy granted for life. — HENRY VI. — Privileges of the commons asserted. — Character of the commons during this reign. — Freedom of elections violated. — Civil wars. — Title to the crown. — EDWARD IV. Raises money by a benevolence. — Character of parliament. — RICHARD III. — Parliamentary recognition of his title. — Depresses the nobility. — Arbitrary measures. — Notions of the prerogative under the Plantagenets. — Fortescue. — HENRY VII. — His title recognised by parliament. — The star-chamber. — Illegal taxations. — Freedom of election infringed. 64

CONVERSATION IV.

HISTORICAL SKETCH. — FROM THE REIGN OF HENRY VIII. TO THAT OF ELIZABETH.

HENRY VIII. — State of society. — Depression of the nobility. — Character of the prerogative. — Commission to levy taxes without assent of parliament. — The king's influence over parliament. — Statutes regulating the succession. — Power given to Henry to will the crown, — and to promulgate proclamations with the effect of laws. — Conduct of the commons with regard to supplies. — Benevolence. — Loans. — Adulation of parliament. — The Reformation. — Courts of Justice. — EDWARD VI. — Hertford, protector. — Unconstitutional powers conferred upon him. — Repeal of obnoxious statutes of the last reign. — Statutes of treason. — Crown interferes in elections. — Mr. Hume's representations. — Character of the commons. — Storey's case. — State of the common people. — Martial law. — MARY. — Freedom of election invaded. — Administration of justice. — Martial law. Page 92

CONVERSATION V.

HISTORICAL SKETCH. — ELIZABETH.

ELIZABETH. — Misrepresentations of the constitutional history of her reign. — Mr. Hume. — Star-chamber. — Court of High Commission. — Martial law. — Arbitrary imprisonment. — Use of torture. — Power of impressment. — Illegal taxation. — Other arbitrary proceedings. — Proclamations. — Mr. Hume's comparison of England with Turkey. — Character of parliaments. — Freedom of election invaded. — Mr. Strickland's case. — Mr. Wentworth's case. — Generally received notions of the prerogative. — Distinction between the government of Elizabeth and a despotism. 117

CONVERSATION VI.

HISTORICAL SKETCH. — JAMES I.

JAMES I. — Important era. — His notions of the English government and laws. — His proclamation for regulating elections. — His style of address to parliament. — Illegal proclamations. — Opinions of the judges upon them. — The great case of impositions. — Other grievances. — Benevolences. — Ecclesiastical courts favoured by the king. — Proceedings of the Court of High Commission. — Prohibitions. — Archbishop Bancroft and Sir Edward Coke. — Monopolies. — Mompesson. — Meeting of parliament in 1614. — Complaints of grievances. — King's displeasure. — Protestation of the commons. — Torn from the journals by the king. — Parliament dissolved. — Members imprisoned. — Benevolence. — Progress of the constitution. — The demands of the commons. — Encroachments, or not, upon the prerogative. Page 144

CONVERSATION VII.

HISTORICAL SKETCH. — CHARLES I.

CHARLES I. — State of the kingdom on his accession. — Temper of Parliament. — Privy Seals. — Compulsory knighthoods. — A new parliament. — Grievances. — The king menaces the commons. — The Duke of Buckingham denounced. — The commons issue a warrant to search the signet office — the king's displeasure — members committed to the Tower. — Parliament dissolved — their remonstrance ordered to be burned. — Loans and benevolences. — Various persons imprisoned for withholding money. — Writs of Habeas Corpus denied. — A new parliament — the king's high language. — Debates of the commons. — Petition of Right — Mr. Hume's representation of that measure. — Infraction of it by the king. — Cruel decrees of the Star-chamber. — Torture. — Felton. — Protestation of the commons — Numbers imprisoned — sent to foreign gaols. — Death of Sir John Elliott — Laud and Strafford. — State of government

during the intermission of parliaments. — Illegal taxes. — Monopolies. — Abuse of justice. — Council of York. — State of the country. — Rigour of the Star-chamber. — Prynne, Bastwick, and Burton. — Case of ship money. — Noble conduct of Lady Croke. Page 176

CONVERSATION VIII.

HISTORICAL SKETCH. — CHARLES I. (*continued*). THE COMMONWEALTH AND THE PROTECTORATE.

Arbitrary character of the government. — State of public feeling. — New parliament. — Excuses offered for illegal taxation. — Grievances. — Parliament dissolved. — Members imprisoned. — Ship-money levied. — Public tumults. — New parliament. — Prynne, Bastwick, and Burton recalled from foreign prisons. — Clarendon's description of the scene. — Strafford attainted. — Act for the perpetual parliament. — Star-chamber and high commission abolished. — Jealousy of the king entertained by parliament; and attempted seizure of the five members. — Civil war. — Success of the Independents. — Trial and execution of the king. — Proceedings of the long parliament. — Character of their government. — Arbitrary measures. — Cromwell. — The little parliament. — Cromwell made protector. — Character of his government. — General observations. 202

CONVERSATION IX.

HISTORICAL SKETCH. — CHARLES II.

CHARLES II. — The restoration. — No limitations of the prerogative. — State of the nation. — Settlement of the revenue. — Abolition of feudal tenures. — Courts of justice. — Act for licensing the press. — Corporation act. — Principle of the test and corporation acts. — Declaration of indulgence. — Dispensing power. — Second declaration of indulgence. — Shutting up of the exchequer. — Popish plot. — Bill of exclusion. — Freedom of elections invaded. — Modes of raising money — benevolence.

— Quo warrantos. — Parliament dissolved. — Character of the four last years of Charles's reign. — Progress of free opinions. — Beneficial statutes. — Habeas corpus act. — Assumed perfection of the constitution. — Standing army. Page 233

CONVERSATION X.

HISTORICAL SKETCH. — JAMES II.

JAMES II. — His arbitrary principles. — His professions. — His pension from France. — Barillon. — Levying of tonnage and poundage without assent of parliament. — Management of elections. — Monmouth's rebellion. — Cruelties of Jeffries. — Standing army. — Temper of the house of commons. — Dissolution of parliament. — The king attempts to gain over the judges. — Sir Edward Hales's case. — Dispensing power. — Court of high commission re-established. — Declaration of liberty of conscience. — Indulgence published in Scotland. — In England. — The church of England alienated. — The dissenters address the king. — James attempts to gain over the members of parliament. — Case of the seven bishops. — Approach of the Revolution. — Prince of Orange's convention. — The settlement of the nation. — Principle of the Revolution. — Blackstone's observations. — Settlement of the crown upon William and Mary. — Bill of Rights. — Observations on the progress of the constitution. 258

CONVERSATION XI.

THE KING.

Sketch of the nature of the regal character, from the conquest. — Never purely arbitrary. — Crown hereditary under certain restrictions. — History of the descent of the crown. — The prerogative. — The king can do no wrong. — His various prerogatives. — His negative voice in the legislature. — His proclamations. — Change in the character of the regal power. — Influence of the crown in modern times. 300

CONVERSATION XII.

THE HOUSE OF PEERS.

Origin of the house of peers. — The *commune concilium*. — Of whom composed. — Separation into *majores* and *minores barones*. — Barons by *tenure* and by *writ*. — Modes of creating peers. — Bishops. — Inferior clergy. — Number of peers. — Scotch peers. — Irish peers. — Functions of the house of lords. — Jurisdiction of the house anciently, in both civil and criminal matters. — Taken away by statute. — No original civil jurisdiction. — In cases of appeal. — For the trial of peers. — Privileges of the lords. — Proxies. — Protests. Page 324

CONVERSATION XIII.

THE HOUSE OF COMMONS.

Origin of popular representation. — Of county representation. — 49 Henry III. — Who were the electors. — Representation of cities and boroughs. — Irregular practice. — In what character the commons were summoned. — Number of representatives. — Power of the king to grant the right of returning burgesses. — Qualifications of electors — in counties — in boroughs. — Qualification of the candidates. — Times of calling parliaments. — Mode of passing acts. — Money bills. — Privileges of the commons — impeachments — privilege of speech. — Character of the commons. — Reform. 340

CONVERSATION XIV.

THE COURTS OF JUSTICE.

Origin of the superior courts of law. — Curia regis. — Justices itinerant. — The court of exchequer. — Of common pleas. — Of king's bench. — Courts of equity. — Inferior courts. — County court. — Court baron. — How justice is distributed. — Progress of a suit at law. — Practice of the court. — Doctrine of arrests. — Courts of error. — Province of the jury. — Mode of proceeding in criminal cases. 360

CONVERSATION XV.

THE LIBERTY OF THE PRESS.

History of the restrictions on the press — principle of a free press. Law of libel. — Mr. Fox's act — public opinion. — Conclusion.
Page 378

INTRODUCTION.

THE scene of the following Conversations was a spacious and well-furnished library, in the ancient mansion of *Elyot*, the residence of one of the oldest knightly families in ——— shire. Before the windows of this delightful apartment, a magnificent terrace extended, leading by a flight of steps into a garden which Evelyn might have planned, and Cowley have celebrated. Broad green walks conducted the wanderer through avenues of well-trimmed trees, and past fountains of the purest water, over which innumerable leaden deities presided. Beyond the "antique maze" of this rich and curious garden, the eye wandered over a noble domain, where wood and water, and waving corn combined to form a truly English prospect. Nor was the eye less gratified with the interior of the apartment, which, to a lover of letters, presented a most captivating picture. Along richly ornamented Gothic bookcases the fair volumes extended in long array, while couches and desks and tables, in every form of luxury and conve-

nience, were stretched before them, for the accommodation of the student. The library had been selected with equal diligence and taste, and exhibited at once the science and the literature of the collector.

The interlocutors in these conversations were Sir Ralph Elyot and his two sons. In the earlier part of his life, Sir Ralph, then a younger brother, had resolved to make the law his profession, but succeeding to the title before he attained his majority, he abandoned his professional studies, and devoted himself to the more instructive pursuits of general literature. For one parliament he represented his native county, and his conduct in the house during that period well became the representative of a family, which had sent so many heroes to the field, and so many patriots to the senate. Some peculiar domestic incidents, however, induced him to resign his seat, and for several years he had resided, almost without intermission, at his country mansion, where he prosecuted with vigour those delightful studies, to which his earliest predilections had led him. He applied himself more particularly to historical enquiries, endeavouring to extract from the burthened page of the historian, the philosophy of his story. For this task he was eminently qualified by his calm and dispassionate intellect, and by a simplicity of feeling which prevented him from taking part with any but the just and the good. Having himself

with some pains examined and traced the rise and progress of the English constitution, he now resolved that his sons should reap the benefit of their father's labours.

The eldest of those sons, Reginald Elyot, was designed by his father to fill that station in the country, which, under other circumstances, he would himself have assumed: without attempting, as some fond parents have done, to educate his son for a prime minister, Sir Ralph Elyot made it his care to lay in his mind the strong foundations of a pure and honourable character, leaving to himself the building of his own fame, and the choice of his own way to distinction. To see the representative of his family following in the track of those celebrated men who had shed so much lustre on his name, was now the dearest wish of Sir Ralph Elyot's heart. From the earliest periods of the English annals, the Elyots had played a distinguished part in both the civil and military history of their times. So early as the 49th of Henry III. a Reginald Elyot had been returned as one of the knights of the shire, and at the distance of nearly six centuries, Sir Ralph hoped to see his descendant and namesake filling the same honourable place. Some years, however, would intervene before that event could take place, and in the mean time Reginald Elyot was anxiously exhorted by his father to apply himself to the study of constitutional history. It was principally

with the view of directing, and forwarding those studies, that Sir Ralph resolved to devote a portion of his sons' vacations from their labours at Cambridge to the conversations contained in this volume.

The youngest of the two sons, Hugh Elyot, who had just commenced his studies at Cambridge, was designed for the bar, or, rather, had himself selected that profession at a very early age. An attachment to mental occupations, and a desire to distinguish himself in public life, had led him to make this choice, though the qualities that he possessed were not, perhaps, altogether such as to promise him eminent success. His industry and resolution, however, supplied the want of more splendid talents, and enabled him, with very moderate means, to perform some tasks which persons of much greater powers might have failed to accomplish. Many of his friends, and even his father, were led, by observing only the result of his labours, into an incorrect opinion of his abilities, and attributed the effects of his painful industry to the exertion of talents which he never possessed. But in honesty of heart and singleness of purpose, in his warm and ardent sympathy with every thing excellent and honourable, Hugh Elyot was all that even his own high-minded father could desire. His first and dearest wish was to perform the duties of his station, whatever they might be, with faithful and zealous hands, and he resolutely

strove to banish from his bosom every mean and ungenerous feeling. He taught himself, by just reflection, never to look for pleasure in the pursuit of anything dishonourable or vicious, and he thus hoped to escape many of the temptations to which those who enter into public life are exposed. With a view to his future destination he had, at a very early age, begun to study the history of his own country, and even the theory of her government, to the examination of which his professional studies, which he had already commenced, occasionally led him. He was, therefore, well qualified to profit by the proposal which his father now made, and to which he joyfully assented.

On an autumnal morning, not very propitious to those field sports in which Sir Ralph Elyot and his sons occasionally indulged, the party assembled in the library which has been just described, and Sir Ralph explained to his eager auditors the plan of instruction which he had devised for the vacation. They earnestly entreated that he would allow them to commence their new and interesting studies without delay, and their father undertook to gratify their wishes.

"But before we enter upon our task," continued Sir Ralph, "I would say a few words with regard to the spirit in which our enquiries ought to be conducted, and the objects which we pro-

pose to ourselves in the prosecution of our labours. I would beg of you, in the first place, to remember, that, in the studies upon which we are about to enter, a candid and unbiassed mind is absolutely necessary to the success of our design. It is only at years like yours that these enquiries can be conducted with impartiality, for in more advanced life it is difficult, if not impracticable, to prevent the operation of those prejudices which we naturally imbibe in our intercourse with society. Fortunately for you, the object of our enquiries is only *the truth*; we have no party to serve, no patron to gratify. To the studies which are about to occupy your attention, I look for the formation of those just and well-grounded principles which are to govern you in public life; and I therefore entreat you, as you value your hopes of honourable distinction, to approach the subject with earnest and with honest feelings. On the opening of our labours I have no theory to offer to you, no peculiar views to expound. I wish you to form, from your own examination, those just and rational conclusions which good sense and impartiality dictate. It too frequently happens that, in our eagerness to support those political principles which we believe to be correct, we view historical events with the eye of a partisan; and against this error I desire particularly to guard you. There is, perhaps, no method better calculated to prevent this abuse than calling to

mind the distinction between *precedent* and *principle*; between that which is, and that which ought to be. Can any rational man for one moment suppose that the fact of the existence of the Commons as a branch of the legislature, before the reign of Henry III., is at the present day in any degree material to our liberties, or that, if such an institution had not existed until the reign of George III., the people of England would have, therefore, a worse title to enjoy it? The antiquity of an usage is, at most, only a means by which we are enabled to judge with more accuracy of its excellencies or defects, which must necessarily be in themselves wholly independent of the time during which the usage has existed. I trust, therefore, that in your zeal for the principles to which you are attached, you will not think it necessary to support them at the expense of truth and candour.

"In the course of our conversations I design, in the first place, to present to you an historical sketch of the history of our constitution from its rise at the Conquest to its establishment at the Revolution of 1688. You must not expect to receive from me, during this part of our labours, any thing like a detailed history of the public transactions of the times, with the general outlines of which you are already acquainted by the perusal of most of our popular historians. I shall only notice public events as they are connected

with the history of the government, and shall leave to your own diligence the task of supplying from other sources any information which does not properly come within the scope of our present enquiries. Having given you a general historical sketch of the constitution, I propose to examine, rather more in detail, the character and history of the regal power and of the legislative bodies; and I shall, probably, devote two or three of our conversations to some other subjects connected with our general design."

CONVERSATIONS

ON THE

ENGLISH CONSTITUTION.

CONVERSATION I.

HISTORICAL SKETCH. — FROM THE CONQUEST TO THE REIGN OF EDWARD I.

The Conquest. — State of England. — Power of the king. — Commune Concilium. — Establishment of the Feudal System. — Explanation of the system — its effects. — WILLIAM RUFUS. — HENRY I. — his charter. — State of the constitution to the reign of JOHN. — Tallages. — RICHARD I. — JOHN. — Magna Charta. — HENRY III. — his extortions — his quarrels with the barons. — Provisions of Oxford. — State of the prerogative. — In whom the legislative power was vested. — Origin of the representative system. — Forest laws. — Administration of justice — fines — purveyance. — Progress of the constitution.

SIR R. E.

THE *Conquest* of England, as it has been usually termed, by William I. may be very properly selected by us as the period from which our labours are to commence. The institutions of our Anglo-Saxon ancestors were at that time, if not abrogated,

yet so very materially changed, as to render the reign of the conqueror the commencement of a new system both in our laws and in our government. We will not stay to fight the battle in which so many zealous antiquarians and patriots have engaged, as to the meaning of the word *conquest*, and whether William acquired his crown by force of arms, or by virtue of the will of Edward the Confessor, as, I trust, that both of you are well convinced that the precedent, which ever way the question may be decided, cannot be of any alarming consequence. I shall, therefore, confine myself in the present conversation to a view of the political situation of this country during the reign of the Conqueror and his more immediate successors.

The state of England, after the battle of Hastings, was, in a political view, very alarming. The government and people were alike at the mercy of the conquerors, and though for some time William did not venture upon those acts of oppression which afterwards distinguished his reign, yet it soon became evident that the nation had found a master. His whole reign, indeed, bears obvious marks of a military government, and furnishes little matter to illustrate our constitutional history. In the exercise of his royal authority, William appears, like all our other monarchs, to have acted with the advice of a council; and in a law, granting exemption to all free men from exaction and tallage, we find the expression that it was granted and con-

ceded by the king, *per commune concilium totius regni.**

R. E.

Of what persons was this common council composed?

SIR R. E.

It is very difficult to say. It appears that the Norman kings were accustomed to hold their courts at the three festivals of Easter, Whitsuntide, and Christmas; but whether on these occasions the common council was assembled, or whether the meeting consisted only of such barons and persons of consequence in the neighbourhood as the king was pleased to summon, has been a matter of dispute. It is difficult to imagine that the barons who resided in the remoter parts of the country were so frequently summoned, and yet we meet with expressions in cotemporary historians which would induce a belief that *all* the barons were often in attendance in the king's court. With regard to the number and description of the persons who constituted this great council, it is probable that there was no settled practice. Not only were matters of state the subject of its deliberations, but it was the *forum* in which the king distributed ustice to his subjects.†

* Fœdera, v. i. p. i. and see the Report on the Dignity of a Peer, p. 29. Wright's Ten. p. 73.

† See Madox's Exch. vol. i. ch. i.

H. E.

Do you suppose that the king could not make laws without the consent of this council?

SIR R. E.

It does not appear that the council claimed a voice in the making of laws, which were, probably, at this time considered to be the act of the sovereign; but it seems clear that in all cases of importance affecting the people at large, the consent of the common council was required before the king ventured to impose either laws or taxes upon his people.

I scarcely need inform you, that one of the most remarkable features in the reign of William was the establishment of that system of feudal tenures which for many centuries had so important an influence, not only upon the habits and manners of the people, but also upon their political condition, and the traces of which are visible at the present day in many of our institutions. As Hugh, however, must be more familiar than myself with Spelman and Selden and Sir Martin Wright, we will give him an opportunity of displaying some of his learning, in a succinct history of feuds as they existed in England. How say you, Hugh?

H. E.

I have no objection to make the attempt, provided you will promise to be a lenient critic, and will correct me when I go astray.

SIR R. E.

Take courage, we will not be severe upon you. You may proceed.

H. E.

I shall not attempt to say any thing of the history of feuds in Europe before the conquest, a subject of prodigious extent, but shall confine myself entirely to an account of them upon their introduction into England by the Conqueror, an event which is supposed by Sir Martin Wright to have taken place with the assent of the *commune concilium*. By the 52d law of William I. an oath of fealty is required, which is supposed to be the origin and foundation upon which the system of feuds, with all its oppressive adjuncts, was established.* According to that system the landed property of the kingdom was supposed to be primarily vested in the king, who granted portions of it to his subjects, upon feudal conditions, which portions were again granted out to be held, on similar conditions, of the grantors. The lords paramount, as they were termed (the immediate tenants of the crown), owed fidelity to the king, the *mesne* lords to the lords paramount, and the tenants to the mesne lords, and thus a complete chain of service and dependence was formed, terminating in the crown. The obligations of the parties were mutual, the lord was bound to protect and defend his tenant, and the tenant to render due

* Wright's Ten. p. 65.

service, according to the nature of his tenure, to the lord. The conditions upon which lands were granted were of various kinds, certain or uncertain, free or servile. Thus a man might hold either by *knights-service*, or *free socage*, or *villein socage*, (words which, for Reginald's benefit, I will shortly explain) and to each of these services there were certain incidents or feudal burthens appertaining.

When lands were granted in knight's service, the tenant was compellable to attend his lord to the wars for forty days in each year; and to this tenure the incidents of relief, primer seisin, wardship, marriage, aids, fines for alienation and escheat belonged. And now as to *relief*. When the tenant died it was customary for the lord to compel a payment from his heir, before he would admit him into the tenancy, thus constraining him, as it were, to make a new purchase of the feud, and this payment was denominated a *relief*. Until settled by Magna Charta the exaction of unreasonable reliefs was a frequent subject of complaint. *Primer seisin*, which was only incident to tenants by knights' service *in capite*, or who held immediately of the crown, was a species of relief, being a payment by the heir of full age, of a year's profits of his lands to the king. *Wardship* seems a natural consequence of a feudal tenure, for when, by reason of his tender years, the infant tenant was unable to perform the services, it was

only just that the lord should take the land into his own hands, in order to provide a fit person to render the services; and the wardship of the body naturally followed that of the land. This wardship continued till twenty-one, in the case of the heir male, and till sixteen in that of the heir female, unless she was above the age of fourteen at the death of her ancestor, in which case she was not placed in ward. You may easily imagine that *wardship* was, in many cases, a fertile source of injustice and oppression, as was also the incident of *marriage*. This was a right claimed by the lord to tender a suitable marriage to his female ward (and subsequently extended to heirs male), and, on her refusal, to receive the value of the marriage from her, or such a sum as the alliance was considered to be worth, a claim which was a prolific source of the most grievous abuses. *Aids* were originally mere benevolences, rendered by the tenant to his lord, in cases of difficulty or distress, but in time became obligatory payments, the most usual of which were for making the lord's eldest son a knight, for marrying his eldest daughter, and for ransoming his person in time of war. By Magna Charta these aids were to be reasonable, but it was not until the reign of Edward I. that the amount payable was settled. *Fines for alienation* could only be demanded from those who held immediately of the crown, who were not allowed to convey away their lands without previ-

ously obtaining a licence for that purpose. The last incident to the tenure by knight's service was *escheat*, which signifies the restoration of the land to the lord on the death of the tenant without heirs, and is sometimes used to express the forfeiture of the lands on the conviction of the tenant for treason or felony. You have seen that the proper *render* or service, in this military tenure, was the attending upon the lord in war, but, occasionally, a pecuniary compensation was accepted in place of it, which was termed *escuage*, and though originally arbitrary, was afterwards levied only by consent of parliament. The tenure of knights' service, with all its oppressive incidents, was finally abolished, as I suppose we shall see hereafter, by the statute 12 Car. 2. c. 24.

The tenure in *free socage* was when the tenant held by performing some certain service, neither of a military nor of a base nature, as by the payment of twenty shillings rent, ploughing the lord's field for three days, &c. The incidents to the tenure in free socage differed from those in knights' service in many particulars. The *relief* was one year's rent. The lord had not the *wardship* of the heir's land, nor was he entitled to the value of his *marriage*, for which he was bound to account to the heir.

Villein socage resembled free socage, except that the services performed were not of the same honourable description, but of a baser nature.

SIR R. E.

I suppose you do not account pure villeinage amongst your tenures?

H. E.

It can scarcely be said to be a tenure, for the villein was a mere occupier of the land at the will of the lord, who might eject him at his pleasure; indeed the condition of the villein was very little superior to that of the slaves in our plantations. Although their lives were protected from the violence of their masters, yet whatever property they acquired was liable to be seized by the lord. If they ran away they might be recovered by action, and the villeins *in gross*, that is to say, those who were not *regardant* or annexed to a manor or land, were capable of being sold or transferred like the miserable Negro. It is supposed that the portions of manors which are now termed *copyhold* lands, were those which were formerly in the possession of the *villeins*. I have now given you a sketch, though a very naked and imperfect one, and I shall look to my father for some remarks upon the effect of the system which I have so briefly described.

SIR R. E.

It will, no doubt, have occurred to you, that the feudal system was the institution of a semi-barbarous age, and was ill adapted to a cultivated

state of society. At a very early period it threw a degree of power into the hands of the greater lords, incompatible with the tranquillity of the country, and the due execution of justice. Our early history is filled with accounts of the wars waged by the nobles against one another; and it was entirely owing to the operation of the feudal system that they were enabled to enter into these tumultuous conflicts. The power which was thus lodged in the hands of the nobles and great lords, was but too frequently abused to purposes of oppression, as we learn from the earlier part of the statute-book, which contains sufficient evidence of the arbitrary aggressions of the nobility. Indeed, the whole spirit of the system of tenures was unfavourable to general liberty, and wholly inconsistent with that freedom of action and of property which distinguishes a well-regulated state. In one point of view, indeed, the feudal system may be considered as having promoted the cause of liberty, in creating a counterpoise to the royal power in the great nobility of the realm; and, accordingly, we find that the prerogative never stood higher than immediately after the depression of the nobles in the reign of Henry VII.

We must now revert from this digression to our historical narrative. On the death of the Conqueror, his son, William Rufus, succeeded in derogation of the right of his elder brother, Robert. It does not appear that the new sove-

reign sought any legislative recognition of his title; and, indeed, throughout his whole reign, he displayed a very arbitrary disposition, exacting large sums from his subjects, apparently without any other authority than his own will, though the common council continued to be occasionally summoned during his reign. In the reign of his successor, Henry I., who, like William Rufus, assumed the sceptre in exclusion of his elder brother, Robert, we find an important recognition of the power and rights of the people. A charter, granted immediately after Henry's accession, stating, that the new monarch had been crowned "*communi concilio baronum totius Angliæ*," provides that the nation shall be relieved from unjust exactions, and that the *malæ consuetudines*, or illegal taxes, by which the kingdom had been oppressed, should be taken away.* The charter concludes with a confirmation or grant of the laws of Edward the Confessor, a code which, from the grievous oppressions of the two first Norman sovereigns, had become the object of general desire. This charter is supposed to have had the effect (and in that view it must be regarded as a most important document) of rendering it necessary for the king, when he had occasion for extraordinary aids, to convene an assembly of his tenants by military service, if not all his tenants in chief, to obtain such aids from them, consistently

* Statutes of the Realm, vol. i. p. 1.

with the terms of his charter.* It is thus one of the earliest authorities, to show that the consent of the people is necessary to their taxation, a principle which forms one of the great corner-stones of our constitution.

I cannot give you a more correct idea of the state of our constitution, from the conquest to the reign of John, than in the words of a valuable document to which we have already more than once referred.

"From the charters of Henry I., of Stephen, and of Henry II., it may be concluded that the constitution of government, with respect to legislation, as expressed in, or to be inferred from, the charter of Henry I., was considered as the law of the land on the accession of Henry II.; and that Henry I. proposed by his charter to restore the law as it stood in the reign of his father, violated, as in many instances it had been, by the tyranny of his brother. It appears, too, from all these charters taken together, that during the reigns of William Rufus, his brother Henry, and Stephen, many things had been done contrary to law; but that there did exist some legal constitution of government, of which a legislative council, for some purposes at least, formed a part, and particularly that all impositions and exactions, by the mere authority of the crown, not warranted by

* Report on the Dignity of a Peer, p. 40. Brady's Answer to Arg. Antinor. p. 265.

the existing laws, were reprobated as infringements of the just rights of the subjects of the realm, though the existing law left a large portion of the king's subjects liable to tallage, imposed at the will of the crown, and the tenants of the mesne lords were, in many cases, exposed to similar exactions. In all these charters, therefore, and afterwards in those obtained from John, and his son, Henry III., at the same time that the exactions of the crown were condemned, the great men were compelled to engage, and those kings seem to have expressly stipulated on behalf of their other subjects, that the restrictions imposed on the crown should also be imposed on the mesne lords. These charters were, therefore, in a great degree, compacts between the crown and its immediate tenants, stipulating *against* the crown for exemption from its oppressions, and *with* the crown for the exemption of others from the oppression of their immediate superiors; the persons contracting directly with the crown being only the king's immediate tenants."

R. E.

What is the meaning of the word *tallage?* The extract you have read speaks of a portion of the king's subjects liable to *tallage.*

SIR R. E.

Tallage means a tax. After granting out portions of land on feudal services, the king retained

a part in his own hands, which was called his demesne land. On this land he suffered persons to live, who were his tenants *in demesne*. In the course of time many towns and boroughs were built on the king's demesne, and it was customary for the king to exact sums of money from the inhabitants, which payments were called tallages. In the same manner the demesne lands of the lords were parcelled out, and their tenants in demesne were subject to the same exactions. *

R. E.

Were the charters, granted by the Norman kings, strictly observed?

SIR R. E.

I imagine by no means. During the expensive reign of Richard I., who was obliged to levy large sums to supply the costs of his expedition to the Holy Land, there is little doubt that the provisions of these charters were frequently infringed; and under the government of his brother and successor, John, the arbitrary measures of the court became still more intolerable, and ultimately gave rise to that great charter, which has been since considered the principal bulwark of our liberties.

This GREAT CHARTER, which John gave "to all freemen of this realm, to be kept in the king-

* Madox's Exch. vol. i. c. 17.

dom of England for ever," may well be regarded as the real foundation of our free constitution, since, in every dispute between freedom and prerogative, it has furnished an unanswerable argument in favour of the former. It dispelled for ever all doubts as to the existence of a despotic government in England, and gave to the people a legal birthright and inheritance in their liberties. It was not merely in the actual provisions which it contained against the oppressions and exactions of the sovereign that it was so truly valuable, but in its general recognition of the privileges of the people, and of the limited prerogatives of the crown. The greater part of the provisions contained in this celebrated charter have now become obsolete, either from the change in the system of tenures, or from the progress of a more correct legislation; but in the great article of personal liberty it is still resorted to for that noble maxim, that no freeman shall be taken or imprisoned but by the lawful judgment of his peers, or by the law of the land.

Before I speak more particularly of the provisions of this celebrated law, I will say a few words as to the circumstances to which it owes its origin. In the reign of John, the character of the government had suffered a considerable change. The charters which Henry I. and Henry II. had granted, confirming the laws of Edward the Confessor, and imposing boundaries upon the prero-

gative, had gradually excited a feeling of independence in the people, or, rather, as I should call them, the owners of landed property, which rendered them unwilling to submit to the illegal exactions of the crown. In consequence of sub-infeudations, or sub-grants from one lord to another, and of that natural tendency which property has, if I may use the expression, to distribute and divide itself, the landed property of the kingdom had fallen into a greater number of hands, and there were, of course, more persons interested in preserving it from the burthens which the court attempted to impose. The extravagance and ill conduct of the king contributed to the general discontent, and ultimately the principal barons of the realm resorted to arms, in order to obtain a recognition by the king of the customs and liberties of the kingdom. With a view of terminating the contest, the king and the discontented barons met at Runnemede, where the latter succeeded in wresting from their sovereign, not merely a full recognition of their former liberties, but many new provisions, most conducive to the public welfare.

H. E.

Will you be good enough to point out the general scope of the provisions of the great charter?

SIR R. E.

I cannot pretend to give you even an abstract

of its numerous enactments; but I will mention some of the principal grievances to which it applied a remedy, and from these you may judge of its general purview and tenor. Notwithstanding the inhibitions of the charters of Henry I. and Henry II., illegal exactions of money had frequently taken place, and it was, therefore, provided by the great charter, that neither scutage nor aid should be imposed in the realm, unless by the Common Council of the realm, except for redeeming the king's body, making his eldest son a knight, and marrying his eldest daughter, and that these aids should be reasonable.

R. E.

This, then, is another clear recognition of the right of voluntary taxation. Whenever the king wanted scutage or aid, it was necessary for him to procure the consent of the Common Council of the realm.

SIR R. E.

The imposition of unreasonable fines, a grievance of great magnitude, was, likewise, regulated by this statute, by which it was enacted, that a freeman should not be amerced for a small fault, but after the manner of the fault, and for a great fault after the greatness thereof, saving to him his *contenement.*

R. E.

Pray what is the meaning of the word contenement?

SIR R. E.

"For the signification," says Lord Coke, "contenement signifieth his countenance;" but this is, perhaps, *ignotum per ignotum*. *Contenement*, or *countenance*, then, signifies the means of livelihood: "the armour of a soldier is his countenance," says his lordship; "the books of a scholar his countenance, and the like."

R. E.

What are the other principal provisions of the Great Charter?

SIR R. E.

They are very various, and relate to the restraining of purveyance, the putting down of wears, the regulation of measures, the custody of heirs, the safe conduct of foreign merchants, the payment of relief and of escuage, and the general regulation of courts of justice. Such are the chief enactments of this celebrated statute, which was ratified and confirmed by subsequent sovereigns, in no less than thirty-two instances; so desirous were our ancestors of securing to themselves the benefits which it conferred.

To enforce the performance of the charter, the barons, not relying on the naked assent of the king, obtained the custody of the city of London as a pledge, and twenty-five barons were appointed to watch over the execution of the new laws. Another provision, also, of a novel nature, was made, with a

view to the same object. Twelve knights of each county were ordered to be elected, to enquire of the bad customs to be abolished according to the charter; a provision which clearly points to the system of county representation subsequently introduced.

It is scarcely necessary for me to advert to the history of John's reign after the granting of the great charter. You, doubtless, recollect the papal bull by which the king was released from the observance of his compact, and the barons stigmatized as worse than Saracens. Encouraged by the menaces of his holiness, John resolved once more to take arms against his rebellious barons, who, in their turn, invited over Louis, the son of Philip the second of France, by whose assistance they gained great advantages over the king. The death of John, in 1216, put a period to the contest.

Henry III., on his accession, was only ten years old, and the guardianship of the king and the realm was assumed by the Earl of Pembroke. In order to conciliate the barons, a charter, framed on the model of that granted in the last reign, was immediately issued; but it is remarkable, that both in this charter, and also in that which was granted in the following year, the important clause with regard to the imposition of scutage and aid was omitted. There are also other considerable variations. The same omission is observable in the

charter issued in the ninth year of this reign (the one contained in our statute book); but, notwithstanding, there is sufficient evidence to show that during this reign the consent of the *Commune Concilium* was still held requisite to the validity of a new taxation. Frequent councils were assembled, at which Henry demanded aids, and upon more than one occasion met with a decided refusal.

R. E.

But did he not, in such cases, resort to violent means of raising his supplies?

SIR R. E.

When he found himself sufficiently powerful, it appears that, like his predecessors, he did not scruple to extort by force that which he was unable to gain by entreaty. The various modes by which Henry attempted to enrich his treasury, at the expense of law and justice, are described by historians as most numerous and extravagant. All his prerogatives were strained to extort money from his subjects, and even justice was denied, unless the suitor was rich enough to purchase it from the king. It could scarcely be expected that the descendants of the barons who had wrung the Great Charter from the hands of John should submit in patience to the oppressions of his successor; and, accordingly, many of the principal nobility, headed by Leicester, appeared in the parliament of 1242 in full armour, and insisted

upon a reformation of the state of the kingdom. To this the king was compelled to assent; and in the parliament which met soon afterwards at Oxford, twelve persons were selected by the king, and twelve by the barons, to make ordinances for the reformation and amendment of the kingdom. The twenty-four were also to choose four, who were to nominate the king's council. The ordinances thus made by the barons received the name of the Provisions of Oxford, and the attempt to subvert them by Henry occasioned the civil struggles which brought on the defeat and capture of the king at the battle of Lewes, and, subsequently, the overthrow of the barons at the battle of Evesham. Out of these contests also arose the representative system.*

R. E.

What were the commonly received notions of the prerogative in the reign of Henry III.?

SIR R. E.

Henry de Bracton, a lawyer of eminence, who wrote in the reign of Henry III., thus speaks of the kingly office. "The king ought not to be under man, but under God *and under the law; for the law makes the king.* Therefore, let the king attribute to the law that which the law attributes to him, viz. dominion and power; for there is no

* See Brady, vol. i. p. 625. Parl. Hist. vol. i. p. 59.

king where the will and not the law bears dominion." * And in another place the same writer tells us, that the king has no authority which he does not derive from the law. †

R. E.

But how do you reconcile these doctrines with the many tyrannical and oppressive acts which distinguish the government of the Norman princes?

SIR R. E.

I have merely informed you what the theory of the government was considered to be by those upon whose authority we can best rely; I do not intend to maintain that it was duly observed. In fact, at this period of our history, the maxims of government were often slightly regarded, since the people at large had but little power of enforcing an observance of them. Hence the heavy and innumerable oppressions which the English suffered under William the Conqueror, and which, in a less degree, extended over some of the succeeding reigns.

H. E.

Does Bracton say any thing from which we may gather the mode in which the legislative power was exercised in his time, seemingly a very obscure and difficult subject? for though I conclude, from what you have said, that, in order to impose

* Bracton, p. 5. † P. 107.

a tax upon the people, it was necessary for the king to obtain the consent of the Common Council of his realm, yet it seems by no means so clear that the same consent was requisite to give validity to every new law.

SIR R. E.

I have alluded to this difficult subject before, and the view we then took is confirmed by what we find in Bracton. At the very commencement of his work that writer declares, that whatever is defined and approved *by the counsel, and with the consent of the Magnates, et reipublicæ communi sponsione* (words which it is not very easy to render), the authority of the king preceding (by which I understand him to mean the convoking of the "*Magnates*" by the royal authority), has the force of law.* To the same effect Glanville, who is said to have written in the reign of Henry II., speaks of the laws promulgated "by the advice of the nobles and the authority of the prince."†

R. E.

Will you explain to us this morning the origin of the representative system in our legislature, which, I think, is usually assigned to the reign of Henry III.?

* Bracton, p. 1. † Glanv. Prolog.

SIR R. E.

I shall treat of that subject in a separate conversation. But you must remember, that in the 49th of Henry III., the knights, citizens, and burgesses, actually formed a component part of the legislature. The history of their introduction I reserve for another opportunity.

The system pursued by the Norman kings of converting vast tracts of country into forests, and thereby subjecting them to the operation of the forest laws, a harsh and cruel code, was justly the subject of great complaint in the earlier part of our history. In the time of William the Conqueror, the killing a beast of chase subjected the offender to the loss of life; "for William," says the Saxon chronicle, "loved the great game as if he had been their father." * John is said to have interdicted the taking of birds throughout the whole of England; but at length the oppressions of the forest laws gave rise to the *Carta de Foresta*, extorted from King John, and confirmed in the 9th of Henry III., which was regarded as an acquisition almost as valuable as the Great Charter itself. By this statute many forests were disafforested, and the severity of the punishments inflicted by the forest laws much mitigated. We may form some idea of the importance which was attached to the observation of this statute, and of the desire which the commons felt to restrain the

* Chron. Sax. p. 191, cited by Hallam, vol. ii. p. 426.

king's prerogative of afforesting, by the numerous instances in which we meet with petitions of the commons that the charter of the forest may be observed.

H. E.

In what manner was justice administered under the Norman kings?

SIR R. E.

For some time after the conquest, the great court of justice was the *Commune Concilium Regis*, or, as the same assembly appears to have been termed, the *Curia Regis*, which met in the king's palace, and in which, as I have already said, the king was accustomed to administer justice to all complainants. In his absence, the grand justiciar, one of the great officers of state, usually presided. It is not difficult to imagine that justice was but imperfectly distributed before such a tribunal, and a practice was gradually introduced of *purchasing* the right to redress. The party suing for relief paid a fine to the king to have justice done him in his court; and thereupon the chancellor, who had the keeping of the king's seal, issued a writ to the *Curia Regis*, directing the court to afford redress.* The abuses and extortions to which this practice gave rise may well be imagined; and the indefatigable Madox has collected a curious catalogue of these disgraceful exactions under

* Madox's Exch. vol. i. p. 86.

Henry II. The clause in the Great Charter, which declares that the king will sell justice to none, was, doubtless, aimed at this grievance. It is not altogether creditable, that the practice should have survived to the present day. Whenever an action is commenced in the King's Bench by an original writ issuing out of Chancery, a fine is still due to the king. We also meet with some other fines of a very singular nature. Thus, William de Ware, and others, fined respectively, that their chattels and houses might not be burned *; Ralf de Cahaignes, that his catalls might be sold for a just price: so Ralph de Cornhell fined 100*l.*, that the king would cause his account to be received without anger and indignation. The county of Devon gave 100 marks, by way of *doman*, that they might be favourably dealt with. William Briewerre fined in one palfrey for hurting one of the king's dogs. It would appear from these records, that at this very early period of our history, the hand of prerogative was frequently laid very rudely upon individuals, and that the royal displeasure was rather guarded against by supplications and peace-offerings, than resisted by an appeal to the laws or to public opinion. It was, in fact, the weakness of the latter which gave so much immunity to the despotic inclinations of the crown. When William Briewerre hurt one of the king's dogs, he was well aware that the

* Madox, vol. i. p. 503.

most effectual mode of securing himself against the monarch's resentment was the timely offering of his palfrey.

Before we part, I must say a few words with regard to the exercise of the prerogative, in the matter of purveyance. In very early times it appears that the king's household was principally supplied from the royal demesnes; but when this practice ceased, the purveyors of the court were accustomed to levy arbitrary contributions of provisions, and to impose arbitrary labour upon the people. A clause in the Great Charter provided against this grievance, which was denounced also in a great number of subsequent statutes, by which, according to Sir Edward Coke *, the purveyors were bound to observe five things. 1. To take only for the king's household. 2. With the consent of the owner. 3. For the market price. 4. To take no more than was necessary for the king's household. 5. Where it might be best spared, and where more plenty was. Notwithstanding these enactments, the purveyors continued their exactions, as we learn from various complaints in parliament. Thus, in the 21st of Edward III., we find the commons complaining that the purveyors take men's goods without payment or appraising, and thus charge the country at their own pleasure. † So, in the 25th Edw. III., the servants of the marshal were presented for

* 2 Inst. 543. † Cotton's Abridgm. p. 55.

taking twelve carts to carry the king's prisoners, when one would have sufficed, and levying ten marks for the redemption of the carts and horses; for which offence they were committed to the Marshalsea.* It was not until the Restoration that this oppressive custom was entirely abolished by statute 12 Car. II. c. 24.

The grievance of purveyance furnishes an excellent illustration of the spirit of the government in those days. By repeated laws, the exaction of provisions and labour, without the consent of the individual, and without a recompence, was clearly condemned, and yet we find continual instances of it in practice. It is scarcely necessary for me to point out the distinction between this state of things, and the condition of the people under a despotic monarch, who, restrained by no law, exacts whatsoever he pleases from the hands of his subjects. At no period of our history, after the Great Charter, was this the case in England; for however grievously the prerogative may have been exercised, the party injured enjoyed the right of appealing to the laws: and, as in the instance I have just mentioned, of procuring the punishment of the immediate offenders. The same observation is, indeed, in a greater or less degree applicable to the whole course of our early constitutional history, in which we may observe

* Vin. Ab. *Purvey*, p. 127.

a prerogative bounded in law, but too frequently unlimited in practice.

We have now traced the history of the constitution to the period when, by the introduction of the representatives of counties and boroughs into parliament, it first began to assume a decidedly popular character. Hitherto the barons and principal tenants of the crown had formed the most important and powerful portion of the community, and had occupied, in the *Common Council*, that place in the government to which their station naturally led them. But as population increased, and property became more widely distributed, the barons and tenants *in capite* were no longer the only persons whose inclinations the sovereign found it necessary to consult, before he ventured to impose taxes or promulgate laws. The freeholders of counties, and the inhabitants of towns were rising into importance, and claimed their proper rank in the constitution. This they obtained at the conclusion of the reign of Henry III.; and from this period we have before us the interesting task of tracing the progress of liberty in the history of the House of Commons.

CONVERSATION II.

HISTORICAL SKETCH. — FROM THE REIGN OF EDWARD I. TO THAT OF HENRY IV.

EDWARD I. — Confirmatio chartarum. — The charters not well observed. — EDWARD II. — Jealousy of parliament. — Lords ordainers. — Their power abolished. — Despotism of Edward II. — EDWARD III. — Complaints of the commons. — Appropriation of supplies. — The commons consulted on matters of state. — Taxes without assent of parliament. — Form of statutes. — RICHARD II. — Commons enquire into the application of supplies. — Complaints of the commons. — Insurrection of the villeins. — Commons withhold the supplies. — Richard strengthens his authority. — Impeachment of De la Pole. — Commission of reform. — Richard attempts to secure a parliament in his favour. — Procures an illegal opinion from the judges. — Impeachment of the king's advisers and the judges. — Richard grows more powerful. — Haxey's case. — Banished judges restored. — Another commission appointed. — Richard's misconduct. — Hereford. — Richard deposed. — HENRY IV.

H. E.

WE have now arrived at the reign of the English Justinian.

SIR R. E.

I perceive that you follow Sir Matthew Hale, in giving that title to Edward I., which, after all, he

scarcely deserved. I acknowledge that many improvements in our system of jurisprudence, were introduced in the course of this reign, but I cannot discern in them many traces of a Justinian. These matters, however, are foreign to our enquiries, which must be directed to the constitutional history of the times. The character of Edward was not favourable to the growth of the constitution. A valiant and politic monarch, whose reputation was advanced by foreign conquest, and whose domestic power was strengthened by his influence over his military retainers, was not likely to feel well disposed towards the nascent privileges of his commons. The charges of his warlike expeditions, however, rendered it necessary for Edward to have frequent recourse to his parliaments; and the representatives of the people, consequently, began to play a conspicuous part in the government. Still the influence of the barons was the great counterbalancing power to the prerogative, and the charter, entitled *Confirmatio Chartarum*, was exacted from the king by the importunities of Humphrey de Bohun, Earl of Hereford, and of Roger Bigod, Earl of Norfolk. By this celebrated statute, *Magna Charta* and the charter of the forest were fully confirmed, and all judgments given against them were pronounced void. It was declared that the aids and taxes already freely granted to the king should not be turned into a precedent; that no taxes should be taken without the common assent of the

realm, saving the ancient aids and prizes due and accustomed; and that the *mal tolt* (that is the illegal tax) upon wool should be no longer raised.

R. E.

Does it not seem from the frequent confirmation of Magna Charta, that its provisions were not well observed?

SIR R. E.

It certainly does; and that circumstance gave rise to another statute, entitled *Articuli super chartas*, which reciting that the articles of Magna Charta and the charter of the forest have not been theretofore observed or kept, "because there was no punishment executed upon them which offended against the points of those charters," establishes a tribunal in every county for the trial of offences against the charters. By this statute, also, the grievance of *purveyance* was restrained.

H. E.

I believe Edward himself was very unwilling to observe the terms of the charter.

SIR R. E.

So much so, that he applied to the pope to relieve him from his difficulties, and obtained from his holiness a dispensation from his oath, and from all excommunications which he might incur (according to the terms of the charters) in consequence of his infringing them.

R. E.

A proceeding not very well calculated to add lustre to the royal character, which, however, appears to have been tolerably well understood by the barons.

SIR R. E.

They certainly watched the king's proceedings with very jealous eyes, and on the accession of Edward II. they displayed more openly their mistrust of the king's government, and the extent of their own power. Having succeeded in banishing Gaveston, the royal favourite, they petitioned the king to issue a commission to a certain number of peers with the power of making ordinances, for the regulation of the royal household, and the general welfare of the kingdom. This singular proceeding, by which a new legislative body, wholly unknown to the constitution, was appointed, is the first instance in our history of the delegation of the sovereign power of the crown, and is to be regarded as one of those anomalies which are occasionally met with in the earlier part of our constitutional annals. How unwillingly the king granted his consent to this commission, appears from the fact of his secretly protesting against it; a wretched instance of equivocation, not uncommon even in later times. It could not be expected that Edward would suffer the ordinances thus established to remain in force longer than his weakness compelled.

him; and accordingly, after his triumph over Lancaster, it was enacted in a parliament assembled at York, that all things contained in those ordinances should cease and lose their force and effect for ever; and that from thenceforward no manner of ordinances made by the subjects of the king, by any power or commission whatever, over or upon the royal power of the king, or against the state of the crown, should be of any force; but that all things which shall be established for the estate of the king or his heirs, and for the state of the realm and people, may be treated, accorded, and established in parliament by the king, with and by the assent of the prelates, earls, barons, and commonalty of the realm, as hath been accustomed.*

H. E.

A very constitutional conclusion.

SIR R. E.

The last parliament of Edward's reign treated of the king's estate in a most novel and extraordinary manner. Being convoked (irregularly, by writs issued under the queen's authority), they proceeded to deprive the king of his crown, for the purpose of placing it upon the brows of his son; and they justified this measure by assigning the king's perversity, in suffering himself to be governed by favourites; his "giving

* Parl. Hist. vol. i. p. 194.

himself to works and employments not convenient, neglecting the business of the realm; his loss of Scotland and other dominions; his imprisoning and executing many great men; his neglect of his coronation oath, and his abandonment of the realm:" all which matters were voted to be notorious beyond contradiction. A committee of lords and commons was appointed to wait upon the king at Kenilworth, to "resign their homage and fealty to the king, in the name of all the rest, to give him notice of the election of his son, and to procure his voluntary resignation of his crown; or, if he refused, to give up their homages, and to proceed as they thought fit." The weak and terrified monarch is said to have swooned on hearing the fatal message, and on recovering he resigned his crown into the hands of his subjects. On the same day, by assent of parliament, Prince Edward ascended the throne.

R. E.

I suppose that the deposition of Edward II. cannot be regarded as a precedent of any authority in a constitutional point of view.

SIR R. E.

Certainly not, further than as showing that the power of altering the succession of the crown, in consequence of the alleged unfitness of the sovereign, was claimed and exercised by parliament. But in this instance not only was the parliament

irregularly summoned, but their proceedings were so violent and unjust, that the deposition of the king must be regarded as altogether unconstitutional, there being no sufficient grounds proved for resorting to that grievous and dangerous extremity.

Many proofs of the increasing authority of the commons are to be found in the long and prosperous reign of Edward III. In the year 1332 a parliament being summoned to consult on the affairs of Ireland, granted a subsidy, "that the king might pay his expenses, and not grieve his people by outrageous taxes, or in any other manner." In return for this liberality, the king, at the request of parliament, and in ease of his people, granted that the commissions lately issued to those who were assigned to fix the tallages in the cities, boroughs, and demesnes of England, should be recalled, and writs issued in due form; and that, in time to come, no one shall fix tallages, except in such manner as in the time of his ancestors, and as in reason he may.* In many other parliaments of this reign it appears that complaints were made against *mal tolts*, or illegal taxations, although such taxes had been granted by the merchants themselves; a proof of the jealous vigilance of parliament over the right of taxation.† In general the court yielded to these

* Rolls of Parl. vol. ii. p. 66.

† See Hale on the Customs, p. 163.

remonstrances, but occasionally excused the malpractice on the ground of necessity. Thus, in the 22d of Edward III., the commons complained, that, in a council holden by Lionel, the king's son, guardian of the realm, it was ordered, without the consent of the commons, that for the keeping the realm and safe conduct of merchant ships, 2*s.* should be taken for every sack of wool passing the sea, &c.; and they prayed that the king would suffer this charge to fall, and that he would send letters to the collectors of it accordingly. To this the king answered, that forasmuch as the charges were ordained for the safe conduct of merchandises into the realm, and out of it to foreign parts, it was hoped that the levying of it for so little a time to come would not be thought grievous. * In the parliament of 1349 we meet with a very important assertion of the rights of the commons, in a long and circumstantial statement of grievances, concluding with the following conditional grant: "Upon these conditions, and not otherwise, as also that they may be entered in the parliament roll, as matter of record by which they may have remedy, if any thing should be done to the contrary in time to come, the said poor commonalty, to their very great mischief, grant to the king three-fifteenths;" and this aid is expressly "assigned and reserved only for the war." This is a very early instance of the salu-

* Parl. Hist. vol. i. p. 287.

tary control exercised by parliament, not only over the granting, but likewise over the application of subsidies.

But it was not merely upon questions of supply that the consent of the commons was now demanded. In 1354 the king being in treaty for a peace with France, the commons were asked "Whether they consented to a perpetual peace if it might be had?" to which they unanimously answered, "*Oil, oil!*" Yea, yea! * Again, in the year 1368, they were consulted on the subject of a peace with the Scots, and advised the king not to assent to the same. †

R. E.

From those authorities, it seems very obvious that the commons had acquired great power, and that the grand principle of popular taxation was fully recognised in this reign.

SIR R. E.

I think so; for although the instances of taxes taken without the assent of parliament were numerous, yet, on the complaint of the commons, the king never controverted their right, although he sometimes evaded their remonstrances. In fact, the commons had now become intimately associated with the king in the administration of the government.

* Parl. Hist. vol. i. p. 303. † Id. p. 321.

R. E.

You say the king never controverted their right; but I observe that Mr. Hume asserts, that Edward openly avowed and maintained this power of levying taxes at pleasure.

SIR R. E.

I have been at the pains of examining the authorities cited by the historian, and I can assure you that they by no means support his position.

H. E.

What was the *form* in which statutes were passed at this time?

SIR R. E.

It varied very much; but, in general, the king *granted*, with the *assent* of the peers, and at the *request* of the commons. This form arose, no doubt, from the custom of presenting petitions from the commons, which, when *assented* to by the peers, and *granted* by the king, had the force of laws. But I shall, perhaps, enter more fully into the consideration of this subject on a future day. In the mean time, let me not forget to call your attention to a remarkable enactment which took place in this reign, and which still points out the boundaries of the law of treason. By stat. 25 Ed. III. stat. 5. c. 2. the offences which constitute the crime of high treason are defined; an

enactment of great importance, when we consider the unsettled state of the law, and the doubtful character of the judges.

On the death of Edward III., the parliament summoned by his successor, Richard II., appears to have gained an accession of strength. On the petition of the commons, seven persons were appointed counsellors to the king for the affairs of the realm, and all the great officers of state were to be named by parliament during the minority of the king; so that, in fact, the government may be said to have been transferred from the hands of the king to parliament and a select council. In granting supplies, also, the commons asserted their privileges most vigorously, as we learn from a highly curious entry which remains on the parliament rolls, of a dispute between Sir Richard le Scrope, the steward of the household, and the commons, in the year 1378.* The controversy commenced by a remonstrance from the commons on the subject of supply, accompanied with a broad hint that they conceived there must be plenty of money in the treasury. To this the council pleaded the great expense of the coronation; whereupon the commons rejoined, that, in consequence of the promise of being discharged from tallages, they had granted a greater sum than had ever before been given in so short a

* See Rolls of Parl. vol. iii. p. 35. and Parl. Hist. vol. i. p. 373.

time, and that, all things considered, they were still of opinion that there must needs be a great sum in the treasury; that in consequence of the murrain amongst their cattle, and the depredations of the enemy on the coasts, they were in a lower condition than ever; and that, in short, they were too poor to bear any further charge. Sir Richard Le Scrope undertook to manage the refractory commons, and commenced with politely giving them the lie. "Saving the honour and reverence due to the king and the lords, there was no truth in what the commons said, as to part of the last grant remaining in the treasury;" — that every penny had been received by Walworth and Philpot, citizens of London, who had been appointed and sworn treasurers in the last parliament, in order to apply this money to the war, and that every penny had been so spent by them. The commons now requested that the king would be pleased to show them how, and in what manner, the aforesaid great sums, thus given and appropriated to the war, had been expended; to which Sir Richard made reply, "That though there never was any account yet given of subsidies, or of any other grants made in parliament, or out of parliament, to the commons, or any others, but to the king and his officers, yet the king willed and commanded, of his own motion, to please the commons (not that it was of right for him so to do, or that he was obliged to it, only by reason of

the request now made), that Walworth should, in writing, clearly show them the receipts and expenses, so that it should not be drawn into an example for the future.

This was undoubtedly a signal victory on the part of the commons, and was followed up by the parliament assembled in the 3d Rich. II. The commons in that parliament petitioned that the lords of the king's council might be discharged, and that a commission might issue to examine the state of the king's household, the expenses and receipts in all the offices, &c.; which latter request was granted.* In the next parliament, we find the commons remonstrating against the amount of the king's expenses, and of the sums demanded from them; but ultimately they consented to a capitation tax, upon every person above the age of fifteen years, which, as you may remember, gave rise to the celebrated insurrection of the villeins under Wat Tyler.

R. E.

That insurrection seems to prove that the common people were acquiring a considerable degree of power.

SIR R. E.

It does: and you will not have failed to remark, that the grand object of the rebels was to procure

* Parl. Hist. vol. i. p. 379.

their enfranchisement, and not merely to compel the repeal of an odious tax. The bondage in which they were held had become too grievous to be borne by men who were aware of the power which they were acquiring. Indeed, there is reason to believe that many of the villeins at this period obtained their freedom; and this, therefore, is the time from which we may date the decline of that odious species of servitude.

In the parliament which met after the suppression of the insurrection, we meet with some remarkable circumstances. The king was poor, and wanted money. The commons desired a pardon for those who had slain any of the rebels, and a general act of oblivion to appease the minds of the common people, which were still in a state of excitement. Richard determined to make the commons purchase his grace by an ample gift: the commons, on the other hand, were terrified at the idea of exciting fresh murmurs, and declared, that considering the evil hearts and rancour of the people through the whole realm, they neither durst nor would grant any manner of tallage. Both parties were endeavouring to drive a hard bargain. The commons said, they would think about the tax on wool. The king replied, that he would think about the pardons. Ultimately, the commons, finding the king obstinate, and wanting the pardons more than their money, agreed that the subsidy on wool and leather should be con-

tinued, and the king immediately passed an act of grace. Here we find the commons bartering their subsidies for a boon from the king, and exercising their great constitutional privilege of withholding their supplies.

R. E.

Did Richard submit willingly to the interference of the commons in the affairs of his government?

SIR R. E.

No. He soon began to display his resolution to act for himself. On the dissolution of the parliament, of which we have just spoken, the king removed Sir Richard le Scrope from the post of chancellor, because he had refused to put the great seal to some large grants of estates to certain favourite courtiers, and this dismissal is said to have been the first unpopular act of Richard's reign. In the year 1386, the commons and the sovereign, if we may credit the relation of a contemporary historian, appear to have come to nearly an open rupture.* The commons having resolved to impeach the chancellor, Michael de la Pole, Earl of Suffolk, for certain crimes and misdemeanors, joined with the lords in a message to the king, begging for the removal of the chancellor and treasurer from their offices. To which the king is said to have replied, that he would not,

* Knyghton.

for them, or at their instance, remove the meanest scullion in his kitchen, and commanded them not to make mention of any such thing for the future, but forthwith to proceed with the business for which they were summoned. To this arrogant message the lords and commons boldly answered, "That they neither could, nor by any means would, proceed in any business of parliament, or dispatch so much as the least article of it, till the king should come and show himself in person amongst them, and remove the said Michael de la Pole from his office." Richard now desired that forty knights should be sent to him to confer with him on this extraordinary matter; but, suspecting the king's sincerity, parliament deputed only the Duke of Gloucester and the Bishop of Ely, to deliver to the king the sense of parliament. The message with which these two peers were charged, is of so singular a nature as to have excited the doubts of some historians * as to its authenticity. They insisted, that if the king obstinately withdrew himself from parliament for the space of forty days, it was lawful for the members to depart; and that if he should alienate himself from his people, and refuse to govern according to the laws and statutes of the realm, it was lawful for the people, by their full and free consent, to depose the king from his throne, and in his stead to establish some other of the royal race

* Brady and Hume.

upon the same. Intimidated by these threats, Richard again appeared in his parliament, and consented to the dismissal of the chancellor and treasurer.

H. E.

The commons gained a great victory in this instance.

SIR R. E.

They certainly did; but you must remember, it was with the assistance of the lords: and to oppose this powerful alliance the king had only his royal name, and the feeble assistance of his courtiers upon which to rely. The latter had become odious, not only to parliament, but to the people at large, by the abuses to which they had given rise, and in which they seem to have been abetted by the king. Walsingham, the historian, tells us, that by the corruption of the king's officers, the public revenue was vainly consumed, and the common people miserably impoverished, while the officers themselves became immeasurably rich.* And from the same author we learn, that the king and his council had ventured to alter, and even to set aside, the statute law of the realm.† In consequence of these grievances, the commons petitioned the king, in the tenth year of his reign, to appoint a commission, with power to correct and amend the abuses, whereby the crown

* Cited Parl. Hist. vol. i. p. 426. † Id. p. 393.

was so blemished, that the laws and statutes were disregarded. * The commission was granted for a year, and the due execution of it guarded with heavy penalties †; but at the close of parliament, Richard entered a protest, that for any thing done in that parliament, the prerogative and liberties of his crown should be safe and preserved. ‡

R. E.

I think Hume inveighs against this commission, as transferring the sovereign power to the aristocracy.

SIR R. E.

He does: and it certainly was substantially a transfer of the sovereignty; but a transfer made at the urgent request of the commons, who were deeply sensible of the great necessity which existed for the measure. Indeed, the history of the subsequent part of Richard's reign evinces the justice of the jealousy manifested by parliament at this time.

The history of the proceedings which followed the issuing of this commission, contains so much curious matter on constitutional points, that I must enter into it rather more at length than is my custom. On his return from a progress which

* Rolls of Parl. vol. iii. p. 221. † Parl. Hist. vol. i. p. 427.
‡ Rolls of Parl. vol. iii. p. 224.

he had made into the north, Richard held a council of his adherents at Nottingham. The principal persons who assisted at it were the Archbishop of York, De Vere, lately created Duke of Ireland; the Earl of Suffolk; Tresilian, the Chief Justice of the King's Bench; and Sir Nicholas Brambre. The first resolution of the council was to summon the sheriffs of the neighbouring counties, for the purpose of ascertaining the disposition of the people to support the king by force. Disappointed in this hope, the court resorted to another measure, which is, I believe, one of the earliest attempts on the part of the crown to secure an undue influence in the House of Commons, and is a clear proof of the growing importance of that body. The sheriffs were commanded to suffer none to be returned as knights or burgesses for the next parliament, but such as the king or his council should nominate. To which they replied, "That the people would be very hardly deprived of their ancient privilege of choosing their own members of parliament; and that if there was a true freedom observed in choosing, it would be almost impossible to impose any person against the people's liking, especially since they would easily guess at the design, and stand the more resolutely upon their right." Unable to acquire this corrupt ascendancy in the commons, Richard looked for assistance to a quarter to which the adherents of prerogative

have seldom looked in vain. He summoned the judges before him to answer divers questions relative to the late proceedings in parliament, and obtained replies in perfect accordance with his wishes. On the subsequent impeachment of the judges, they averred that the answers had been extorted from them by threats. Knyghton, indeed, tells us *, that Belknap, Chief Justice of the Common Pleas, did very earnestly refuse to sign the resolutions, till De Vere and De la Pole forced him to it, threatening to kill him if he refused: whereupon, having affixed his seal, he burst forth into these words, -- "Now want I nothing but a ship, or a nimble horse, or a halter, to bring me to that death I deserve." The opinions of the judges comprised the following points: That the new commission was derogatory to the prerogative: that they who procured it were punishable with death: that they who moved the king to consent to it, or who compelled him to consent to it, were punishable in like manner: that the king may appoint what is to be first treated of in parliament: that the king may dissolve the parliament whenever he pleases: that it is treason to impeach any of the king's officers in parliament without the king's will. †

R. E.

The observations of Mr. Hume upon these resolutions are surely very extraordinary. He

* Col. 2694. cited Parl. Hist. vol. i. p. 435. † Id. 433.

affirms that, "even according to our present strict maxims with regard to law and the royal prerogative, all these determinations, except the two last, appear justifiable." Is this so?

SIR R. E.

I think not. It is undoubtedly competent for the king and both houses of parliament to set what limits they see fit to the prerogative, and the historian might as well insist that the act of settlement is illegal, as that this commission, issued for the purpose of reforming abuses, was contrary to the spirit of the constitution. Sir Michael Foster, an able and learned judge, thought very differently from Mr. Hume on this subject. "In this manner," says he, "did these judges prostitute their sacred character." * Notwithstanding the pains of treason denounced in these resolutions against those who should venture to impeach the king's ministers, the prelate and noblemen who had formed the king's council at Nottingham were, together with the judges who had signed the resolutions, *appealed* of high treason, and many of them not appearing to the summons were condemned unheard.† Much violence and injustice distinguished the conduct of parliament on this occasion. Before the trial of the offenders, every member took an

* Discourses, p. 396.

† See State Trials, vol. i. p. 90. See the account of these transactions in Petyt's Jus Parliamentarium, chap. 8.

oath to maintain and support the lords appellants, as the five noblemen who introduced the impeachment were called, a proceeding not very decorous in persons who were about to sit in judgment on that impeachment. In the course of this proceeding, we find the principle that the king can do no wrong recognised, in a resolution of parliament, that nothing in the impeachment or in the judgment should be accounted any fault or dishonesty in the king's person, nor should turn in prejudice of the same. * At the same time the lords and commons took an oath to support and maintain the proceedings of parliament, which separated in very good humour.

Within two years, however, from this time, the king came of age, and assumed to himself the full powers of government. The circumstances accompanying this event are but imperfectly known, and it is difficult to conjecture the means by which Richard was enabled to emancipate himself so completely from the control of parliament. For some years after this time Richard appears to have been upon good terms with his commons; but in the year 1397 a dispute arose, which plainly manifested the great alteration which had taken place in the temper of parliament. To a complaint of the commons, alleging, amongst other grievances, the extravagant expenses of the royal household, the king answered that it was a great offence against

* Parl. Hist. vol. i. p. 458.

his royal majesty, and the liberty of him and his honourable progenitors, which he was resolved to maintain by God's aid; and he commanded the Duke of Lancaster and the Speaker of the Commons, upon their allegiance, to declare to him the name of the member who had brought in the bill. Terrified by this reception of their petition, the commons made a formal excuse. They declared that the person who brought in the bill was Thomas Haxey, Clerk; that it was never their intent to displease his majesty, especially about this matter touching his person, or the government of his house, or the lords and ladies of his court, knowing very well that such things did not belong to them, but to the king himself. * Upon this submission the king was pleased to excuse his commons; but Haxey was most iniquitously convicted of high treason, a judgment which was revoked in the following reign. The king followed up this advantage by other rigorous measures. The famous commission, which had caused so much dissension, was annulled. The Duke of Gloucester, the Archbishop of Canterbury, and others, who had been the conspicuous supporters of that measure, were adjudged to be guilty of high treason; the proceedings in the parliament of 2 Rich. II. were annulled; the judges, who had been banished for the illegal answers rendered to the king's questions at Nottingham, were recalled,

* Rolls of Parl. vol. iii. p. 339. Parl. Hist. vol. i. p. 482.

and those answers declared to be legal; and Richard seemed to have succeeded in reducing the frame of government to an almost despotic monarchy.

In the prosecution of his arbitrary designs, the king received considerable encouragement from the appointment, in pursuance of the request of the commons, of a number of commissioners, with power to enquire into and adjudge upon the petitions then pending before parliament. These men appear to have lent themselves to many of the illegal measures contemplated by the king, and thus served to render his government still more odious. Amongst other acts of injustice, they revoked certain letters-patent which the king had granted to the banished Duke of Hereford —

> "Call'd in the letters-patent which he had
> By his attornies-general to sue
> His livery, and denied his offered homage."

You have learned the whole story from Shakspeare, and I need not, therefore, repeat it to you now. Hereford, thus driven to employ force for the recovery of his inheritance, the dukedom of Lancaster, was induced by the disordered state of the kingdom, and the unpopularity of Richard, to extend his views to the crown itself. Notwithstanding his defect of title, his claim was favoured by the nation, and articles of accusation were exhibited against Richard in parliament, upon which

a solemn sentence of deposition was passed. The throne being thus vacant, the Duke of Lancaster made claim to it, "and the lords spiritual and temporal, and all the states then present, being severally and jointly interrogated what they thought of that claim, the said states, with the whole people, without any difficulty or delay, did unanimously consent that the said duke should reign over them." *

H. E.

This transaction seems greatly to have excited the spleen of Mr. Hume, who says, that "the whole forms such a piece of jargon and nonsense as is almost without example, and that Henry became king, nobody could tell how or wherefore."

SIR R. E.

It is not usual for persons to become kings without our being able to tell how or wherefore; and if Mr. Hume is unable to explain the causes which led to the elevation of Henry, it is not altogether creditable to his character as an historian, bound to trace the origin and causes of the transactions which he relates. Mr. Hume might, perhaps, have discovered some reasons for the deposition of Richard in the arbitrary courses pursued by him, during the latter years of his reign; but, unfortunately, the historian's prepossessions were all in favour of erring royalty. Whatever personal

* State Trials, vol. i. p. 153.

or party motives may have mingled in the transaction, (and where shall we find any great political movement free from such alloy?) I cannot but regard the deposition of Richard II. as the grand model of that revolution to which we all look as the seal of our liberties. The policy of placing Henry upon the throne is no doubt of a more questionable nature, since that measure led to all the confusion and bloodshed which accompany a disputed succession, but we must carefully distinguish the right exercised on this occasion by the people of England, through their representatives in parliament, from the impolitic application of that right in the particular instance.

CONVERSATION III.

HISTORICAL SKETCH. — FROM THE REIGN OF HENRY IV. TO THAT OF HENRY VIII.

Character of the reign of HENRY IV. — Removes officers of his household on request of the commons. — Appropriation of supplies. — Descent of the crown settled in parliament. — Act for freedom of elections. — Debates of commons not to be disclosed to the king. — Commons bring forward articles for the regulation of the kingdom. — The king more peremptory with the commons. — No instances of illegal taxation. —HENRY V. — Loan on security of parliament. — Parliament consulted on affairs of state. — Arbitrary practices. — Subsidy granted for life. — HENRY VI. — Privileges of the commons asserted. — Character of the commons during this reign. — Freedom of elections violated. — Civil wars. — Title to the crown. — EDWARD IV. Raises money by a benevolence. — Character of parliament. — RICHARD III. — Parliamentary recognition of his title. — Depresses the nobility. — Arbitrary measures. — Notions of the prerogative under the Plantagenets. — Fortescue. —HENRY VII. — His title recognised by parliament. — The star-chamber. — Illegal taxations. — Freedom of election infringed.

SIR R. E.

Notwithstanding the violence and commotions which distinguish the reign of Henry IV., it was, upon the whole, favourable to public liberty and

the growth of our free constitution. The king, sensible of his defective title, was anxious to keep upon good terms with his parliament, from whose hands he had in fact received his crown. In the fifth year of his reign he consented, on the request of the commons, to remove four persons of his household, saying, "that though he knew no cause why they should be removed, yet since the lords and commons had thought it proper to have it so, for the good of himself and the realm, he discharged them, as he would have done any other of his house, who should incur the hatred and displeasure of his people." Soon after this concession, at the request of the commons, a committee of the lords was appointed to prepare certain regulations for the ordering of the household, which were confirmed by the king.* In the following parliament we find the commons following the example of their predecessors, in the reigns of Edward III. and Richard II., and granting a conditional subsidy for the maintenance of the war, to be paid into the hands of two knights, who were sworn to execute the office of treasurer. † In the same parliament the commons again interfered in the arrangement of the king's domestic affairs, by recommending the young lords John and Humphrey, two of Henry's sons, for advancement to honourable estates and livings. ‡

* Parl. Hist. vol. ii. p. 78. † Id. p. 84.
‡ Id. p. 85.

R. E.

The commons must certainly have acquired strength before they ventured to meddle so nearly with the king's private interests.

SIR R. E.

They undoubtedly had, of which Henry was well aware, and as he was about to require their sanction to the settlement of the crown, he was of course desirous of keeping them in good humour. We have seen that on the deposition of Edward II. and Richard II. parliament assumed to itself the right of limiting the devolution of the crown, but no instance had yet occurred, in which the king, while in full possession of his power, had resorted to that body for the purpose of effecting a settlement of the crown. In the seventh year of this reign, however, that great principle was recognized by the passing of an act, entailing the crown of England on Henry, and the heirs male of his body.

The commons also strengthened their influence, by procuring an act to be passed, for securing the freedom of election*, from which we may conjecture, that Henry, like his predecessors, had attempted to create a court-interest in the lower house. We likewise meet with the first claim of a privilege, which, under the Stuarts, was frequently infringed, and which is now regarded as one of the

* 7 H. 4. c. 15.

principal liberties of the commons, "That it should be lawful to debate all matters relating to the realm, without disclosing the same to the king, before a determination made thereof, and that to be done by the mouth of the speaker." *

You will have observed, that up to this period the commons did not, systematically, interfere in the administration of government, but confined themselves, for the most part, to complaints of particular grievances. In the present reign, however, they ventured further, and attempted to assume that important station in the country which they have since occupied. The speaker of the house of commons, coming before the king and lords, requested that all the lords of the council might be sworn to observe certain articles, which they had drawn up for the better regulation of the kingdom. The Archbishop of Canterbury, for himself and others, refused to swear: the king charged that prelate, and the rest, on their allegiance, to take the oath, and moreover commanded all the officers of his household, and the judges, to enter into the same engagement.† These articles relate to the regulation of proceedings before the council, the administration of justice, the government of the king's household, and other matters of importance, and are, upon the whole, highly creditable to the good sense and resolution of the commons.

* Parl. Hist. vol. ii. p. 110.
† Id. vol. ii. p. 103.

R. E.

Did Henry and his commons maintain this good understanding throughout the whole of his reign?

SIR R. E.

There are some instances in which he denied their requests. In the first year of his reign the house declared, that it was not usual for them to grant any subsidy before they had received answers to their petitions, and they prayed the observation of that custom from thenceforth. To which the king (in conformity, as you may remember, with the resolution of Richard's judges at Nottingham), gave the following answer: "That there never was any such use known, but that they should first go through with all other business before their petitions were answered, which ordinance the king intended not to alter." * In the last parliament of this reign, the commons met with something like a rebuke from the king. Sir Thomas Chaucer being presented to the king as speaker, prayed that he might speak under the usual protestation of liberty of speech; to which the king answered, that he might speak as others before had done, but not otherwise, for he would have no novelties introduced, and would enjoy his own prerogatives.† It is difficult to ascertain the occasion of this harsh remark, so incompatible with Henry's usual courtesy to his parliament; but it

* Parl. Hist. vol. ii. p. 64. † Id. p. 121.

is probable that, finding his power fully established, he no longer thought it necessary to court the commons at the expense of his prerogative. It was said in the same parliament, that a report had been spread, that the king had been offended at the proceedings of the last parliament, and both houses, therefore, desired that the king would embrace and esteem them as his loyal subjects, which request, he, out of his mere grace, was pleased to grant.* It is probable that Henry, had he lived, would have assumed a still higher tone.

H. E.

Are there any instances of illegal taxation in the reign of Henry IV.?

SIR R. E.

"In Henry the Fourth's time," says Sir M. Hale, "I find no complaint of any imposition set on merchandize, and it concerned him to be just to his people." † It is, indeed, one of the chief merits of the Lancastrian princes, that they abstained from illegal taxation.

The reign of Henry V., though, in the usual acceptation of the phrase, one of the most glorious in our annals, will furnish us with very little matter of observation. The successful wars with France rendered Henry a favourite with his people, who did not hesitate to grant with cheerfulness the sup-

* Parl. Hist. vol. ii. p. 123. † Hargr. Law Tracts, p. 184.

plies which a foreign warfare required. Throughout this short reign, we find no attempt on the part of the crown to extort money from the people, but when the necessities of the royal exchequer demanded a loan, the security of parliament was offered to those who were pleased to contribute.* The privileges of the commons appear to have been respected by the king, and a confirmation of their claim, that no statute should be valid, unless it was enacted with their assent, was obtained.† It appears, also, that at this time, as in the reign of Edward III. ‡, parliament was consulted on matters which, according to the present theory of the constitution, are properly within the province of the king's prerogative, such as the foreign relations of the country, and the propriety of engaging in wars, or of making peace. Thus the articles of the treaty concluded with the Emperor Sigismund were submitted to the inspection of parliament.§ Upon the whole, therefore, the reign of Henry V. must be considered as favourable to the progress of liberty.

R. E.

Does not Hume speak of the "arbitrary practices" of this prince?

SIR R. E.

He does. His words are, "It was in vain that

* Rolls of Parl. vol. iv. p. 95.
† Ibid, p. 22. Lingard, vol. iii. p. 382.
‡ See ante, p. 46.
§ Rolls of Parl. vol. iv. p. 96—99.

the parliament pretended to restrain him from arbitrary practices, when he was reduced to such necessities;" and he instances the levying of purveyance. But, with the exception of this one instance, I know not the arbitrary practices to which the historian alludes. He expressly admits, that none of the princes of the house of Lancaster ventured to impose taxes without consent of parliament, and I am not aware of any other arbitrary practice of which this king can be accused. We must therefore consider the observation as one of those artful contrivances, by which the historian has endeavoured to degrade the early constitution of this country, in order to extenuate the conduct of the princes who attempted to subvert it.

R. E.

How did Henry contrive to support the expenses of his French wars, without resorting to those irregular methods which Edward III. employed?

SIR R. E.

His popularity was such, that the commons did not hesitate to grant him all the supplies he required; nay, they went so far as to settle the subsidy on wool, &c. to the king during his life; a dangerous precedent, as the commons themselves appear to have thought, since they added a proviso to their grant, that it should not be made an

example of by any other king of England in time to come.*

In a constitutional view, the reign of Henry VI. is chiefly remarkable for the progress made by the commons in asserting their own importance, and endeavouring to establish their privileges. In 1431, complaint being made to the house that Lake, the servant of one of the members for London, had been committed to the Fleet for debt, an act was procured for liberating the prisoner until the end of the parliament.† An act was also passed "for the punishment of those who make an assault upon any that come to the parliament."‡ In the case of Thorpe, however, they were not so successful. They represented to the king and lords, that Thorpe, who had been chosen their speaker, had been imprisoned, and they requested he might be set at liberty, according to the privileges of their house. This was opposed by the Duke of York, on the ground that he had recovered a verdict for damages against the speaker, and had taken his body in execution. The question was referred to the judges, who delivered their opinion, that if any member of parliament be arrested for such cases as are not for treason, felony, or surety of the peace, or for a judgment had before parliament, it was usual for

* Parl. Hist. vol. ii. p. 149.
† Id. p. 220. Hatsell's Prec. vol. i. p. 18.
‡ 11 Hen. 6. c. 11.

such person to be quitted of such arrest, and set at liberty, to attend his service in parliament. Notwithstanding this clear opinion, the lords, through the influence, doubtless, of the Duke of York, adjudged Thorpe to remain in custody, and the commons were compelled to choose a new speaker. *

Throughout the whole of Henry's reign, we find the commons sustaining their character by a vigilant observance of the measures of government, and by remonstrances on the subject of the royal expenditure, and the conduct of the king's ministers. Thus, in the year 1450, they impeached the Duke of Suffolk, and, at the request of the speaker, the lords committed that nobleman to the Tower. † The resolution of the lower house was likewise displayed in their request for the appointment of a protector, in the year 1455. "Forasmuch," says the chancellor, "as the commons have made twice their desire and request, and that it is understood that they will not further proceed in matters of parliament to the time that they have answer of their desire and request, what is thought to your wisdoms that should be done in this behalf?" ‡ Here, then, we find the commons insisting on the right, which, as we have seen, was before denied to them, of obtaining satisfaction for their grievances before they pro-

* Parl. Hist. vol. ii. p. 228. Hatsell's Prec. vol. i. p. 29.
† Id. p. 279. ‡ Rolls of Parl. vol. v. p. 285.

ceeded on any other parliamentary business. The necessity for the concurrence of this body in making any limitation of the succession, was fully recognised in 1460, when the crown was settled upon Henry VI. for life, and, after his death, upon the Duke of York.*

R. E.

Do you find any instances in this reign of the interference of the crown in the election of members of parliament?

SIR R. E.

In the 38th year of his reign, Henry seems to have been guilty of a flagrant violation of the privileges of parliament, by issuing letters patent, instead of writs, for the election of the knights of the shire, under which the sheriffs returned such persons as were known to be agreeable to the court. An act was passed to render such elections legal †; but, in the following parliament, the proceedings of that parliament, the members of which had been thus unduly elected, were set aside; "which parliament," says the petition, "was unduly summoned, and a great part of the knights for divers shires of this realm, and many citizens and burgesses from divers boroughs, appearing in the same, were named returned and accepted, some of them without due and free

* Rolls of Parl. vol. v. p. 379. † Id. p. 367.

election, and some of them without any election, against the course of the laws, and the liberties of the commons." *

H. E.

You have said nothing of the civil wars in this reign. Do they not come within the scope of our conversations?

SIR R. E.

I think not, except inasmuch as they are connected with the title to the succession, and as they contributed to lessen the influence of the aristocracy, by the destruction of so many of its most distinguished members. I thank you, however, for reminding me of the subject, as it will afford me an opportunity of saying a few words as to the claims of the contending houses of York and Lancaster. That the hereditary title to the crown existed in the Duke of York, and afterwards in his son, Edward IV., cannot be doubted, and so far, therefore, as hereditary right can go, the crown was theirs; but, in another point of view, their claim is of a much more questionable nature. On the accession of Henry IV. there had been a parliamentary settlement of the crown; and, unless we deny the right of the king, with the consent of both houses of parliament, to regulate and dispose of the succession, we cannot but recognise Henry

* Rolls of Parl. vol. v. p. 374.

and his heirs as the lawful sovereigns of this realm. From the deposition of Edward II. to the act of settlement, in the reign of William III., it has been an acknowledged constitutional maxim, that the succession may be thus regulated and disposed of; — a maxim, to the application of which, in the year 1688, we owe the blessings of the Revolution. "The crown," says a learned and enlightened judge *, "having been entailed, by act of parliament, on Henry IV. and his issue, the house of York saw itself totally excluded, unless its pretensions could be supported by a title paramount to the power of parliament. Proximity in blood was its only refuge, and to that the partisans of that house resorted; and, in so doing, they brought upon themselves, in my opinion, the whole guilt of that deluge of blood which was afterwards spilt in the unnatural war between the two houses." In these sentiments I heartily coincide, as most just and constitutional; and I rejoice in finding them sanctioned by the grave authority of Mr. Justice Foster.

R. E.

You are such a determined Lancastrian, that I fear you will not give us an impartial account of Edward IV.

SIR R. E.

It will not be very favourable, but I will en-

* Foster's Discourses, p. 403.

deavour to make it impartial. For some time after the restoration of the house of York, the parliament seems to have been almost entirely employed in attainting and reversing attainders. Having settled his government at home, Edward was ambitious of prosecuting a war with France, for which it was necessary to obtain some large supplies. The subsidy of tonnage and poundage was, as in the reign of Henry V., granted to the king for life *; but, not content with the liberality of parliament, Edward resorted to a new method of raising money, which, as it formed a precedent for the exactions of subsequent sovereigns, merits a particular notice. We are told by Hall, in his Chronicle †, that "the king caused his officers to bring before him, one after another, the richest and most substantial citizens; and to them he explained the cause, purpose, and necessity of the war begun with France, and the weakness of his treasury to carry it on; requiring them, by the love and regard they owed their natural prince, out of gratitude and kindness to him, that they would give him freely some aid in money towards the maintenance of the war and army: This invention had its effect; some calling to remembrance the benefits received from him, some with shame, and some with fear, moved and encouraged, gave liberally of their money, which could

* Hale on the Customs, Hargr. Law Tracts, p. 189.
† Cited Parl. Hist. vol. ii. p. 363.

not have been otherwise obtained without much grudging and reluctancy." Now comes an amusing anecdote of the old chronicler's. "The king had called before him a widow gentlewoman, much abounding in wealth, and equally stricken in years, of whom he only demanded what she would freely give him towards the support of his great charges. '*By my troth*,' quoth the old lady, '*for the sake of thy lovely countenance, thou shalt have twenty pounds.*' The king, expecting scarce half that sum, thanked her, and gave her a loving kiss. Whether the flavour of his breath did so warm her old heart, or she esteemed the kiss of a king so precious a jewel, she swore directly that he should have twenty pounds more, which she as willingly paid as offered."

H. E.

Sir Edward Coke, speaking of this benevolence, says, "The success and event was, that whereas the king called this a benevolence, to please the people; yet many of the people did much grudge at it, and called it a *malevolence*." *

SIR R. E.

I apprehend that the measure proved an unpopular one; for, in the Duke of Buckingham's speech at Guildhall, at the commencement of the following reign, his grace, who wished to captivate the affections of the people, inveighed against this

* Rep. part 12. p. 119.

mode of taxation *, which, as we shall see, was abolished in the reign of Richard III. It is probable that Edward did not raise any considerable supplies by this artifice, for we find him resorting to other means for replenishing his treasury. He exacted the customs with the utmost severity; kept in his hands the temporalties of the vacant bishoprics; levied fines for confirming defective titles; and neglected no means which might prevent the necessity of calling a parliament, of which he seemed to entertain a salutary dread. Between the 14th and 17th years of his reign no parliament appears to have been summoned; and upon their convocation in the latter year, we find the chancellor and the Bishop of Lincoln admonishing them of the duties owing from subjects to their sovereign, and reminding them that *non sine causâ rex gladium portat.* †

R. E.

Had the commons then annoyed the king by their complaints?

SIR R. E.

No: on the contrary, there are very few traces on the Rolls of Parliament of complaints of grievances during this reign. The king did not, indeed, attempt to impose any illegal customs; and if he gave cause for remonstrance in minor

* Rep. part 12. p. 119. † Rolls of Parl. vol. vi. p. 167.

matters, the commons were content to bear with them in silence. On the subject of privilege only did they display any of that spirit which had so frequently distinguished their predecessors. In four several cases, the house vindicated the right of its members to exemption from imprisonment on civil process.* Upon the whole, however, I am inclined to think that the growth of the constitution was rather checked than forwarded during this reign. Hitherto the lords and commons had, on all great political questions, for the most part, united in bounding and restraining the prerogative; but, under Edward IV., the peers, reduced in number and impoverished in resources, were not enabled to offer any effectual opposition to the crown, while the commons were still too weak to sustain such a conflict unassisted.

R. E.

I believe Richard III. resorted to parliament for a recognition of his title.

SIR R. E.

He did; and procured an act establishing his title as heir to his father, the Duke of York, in exclusion of the children of his elder brothers, Edward IV. and the Duke of Clarence, the issue of the former being declared illegitimate, and that of the latter incapable of inheriting in conse-

* Hatsell's Prec. vol. i. p. 39.

quence of the duke's attainder. There is a curious recital in this act, showing how completely the power and influence of parliament had become felt and acknowledged. The statute recites, "that forasmuch as the court of parliament is of such authority, and the people of this land are of such a nature and disposition, as experience teacheth that manifestation or declaration of any truth or right made by the three estates of this realm assembled in parliament, and by the authority of the same, maketh, before all other things, most faith and certain quieting of men's minds, and removeth the occasion of doubts and seditious language;" it is, therefore, pronounced, decreed, and declared, that Richard was and is the undoubted king of England, as well by right of consanguinity and inheritance, as by lawful election, consecration, and coronation. *

H. E.

What was the general tenor of Richard's government?

SIR R. E.

His principal object was to depress the nobility, whose influence might prove unfavourable to his title, and to conciliate the commons, whose power was by no means so formidable to him. With the latter view, a statute was passed to abolish the illegal mode of taxation which

* Parl. Hist. vol. ii. p. 400. Rolls of Parl. vol. vi. p. 241.

Edward IV. had resorted to, under the name of a benevolence, "whereby," according to the preamble, "divers years the subjects and commons of this land, against their wills and freedom, have paid great sums of money, to their almost utter destruction." It is, therefore, enacted, that such exactions, called Benevolences, shall be damned and annulled for ever.*

R. E.

I suppose, then, that Richard did not resort to any illegal modes of taxation.

SIR R.

If we may believe an old historian, he did not hesitate to employ arbitrary means to replenish his exchequer, for "he sent out his creatures, who, by prayers and threats, by hook and crook, scraped and gleaned together vast sums of money from almost all sorts of people, and carried it to the king's treasury."† Richard likewise displayed great severity in prosecuting his political enmities, as the Rolls of Parliament sufficiently testify, by the number of attainders which we find there. Historians tell us, that two satirical lines, the poignancy of which seems scarcely sufficient to have excited the royal indignation, were the cause of the death of their author, William Col-

* 1 Rich. 3. c. 2.

† Hist. Croy. Cont. p. 576. cited Parl. Hist. vol. ii. p. 411.

lingbourne, who was convicted of high treason for adhering to the Duke of Richmond:—

"The Cat, the Rat, and Lovell the Dog,
Rule all England under a Hog."

alluding to Catesby, Ratcliffe, and Lovel, the king's servants, and to Richard himself, one of the supporters of whose arms was a wild boar.*

H. E.

Before we pass to the Tudors, you will, perhaps, be good enough to notice the mode in which Sir John Fortescue speaks of the king's prerogative at this time.

SIR R.

I had not forgotten it; for certainly the most satisfactory authority, as to the nature and extent of the regal authority in England, under the sceptre of the Plantagenets, is to be found in the pages of Fortescue, who was chief justice in the reign of Henry VI., and who composed his celebrated treatise, *De laudibus legum Angliæ*, for the use of the young prince during his residence with him in France. No stronger evidence can possibly be given than is found in this work, to show that the government of England was at this time considered strictly and essentially a *limited* monarchy. That the authority proceeds from the pen of a lawyer, adds strength to the position, for

* Kennet's Hist. vol. i. p. 507.

undoubtedly (I speak with all submission, Hugh) the expounders of our laws have at all seasons displayed a strong affection for the prerogative. In explaining to his royal pupil "the nature of a government which is political," Fortescue says, "A king of England cannot, at his pleasure, make any alteration in the laws of the land; for the nature of his government is not only regal, but political. Had it been merely regal, he would have had a power to make what innovations and alterations he pleased in the laws of the kingdom, impose tallages and other hardships upon the people, whether they would or no, without their consent; which sort of government the civil laws point out when they declare *quod principi placuit legis habet vigorem.* But it is much otherwise with a king whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subject, nor burthen them, against their wills, with strange impositions; so that a people governed by such laws as are made by their own consent and approbation, enjoy their properties securely, and without the hazard of being deprived of any of them, either by the king or any other." * Many other passages, equally strong, might be pointed out. Thus, in the 13th chapter, it is said that the "king has the delegation of power from the people, and has no just

* Fortesc. p. 24. c. 9.

claim to any other power but this." And again, in the 14th chapter, we are told that the "king can have no powers rightfully, but from the people." Perhaps the above passages are sufficient to overthrow the idea which Mr. Hume wishes to convey, that at a much later period than this, England had but few pretensions to a constitutional form of government: I shall, however, add a few lines more. In the chapter entitled "How statutes are made in England," Fortescue says, "It only remained to be inquired whether the statute law of England be good or not. And as to that, it does not flow solely from the mere will of one man, as the laws do in those countries which are governed in a despotic manner, where sometimes the nature of the constitution so much regards the single convenience of the legislator, whereby there accrues a great disadvantage and disparagement to the subject. But the statutes of England are produced in quite another manner. Not enacted by the sole will of the prince, but with the concurrent consent of the whole kingdom, by their representatives in parliament."

The accession of Henry VII. has been considered by some writers as the commencement of the modern history of England; but I doubt the correctness of this division of our annals, at least so far as it regards our constitutional history. Changes had, indeed, been wrought; but they were not so complete as the friends of a free and

good government would desire. The spirit of general improvement was still dormant, and it was not until the reign of James I. that the great principles of the constitution became fully diffused and understood. When Henry ascended the throne, the liberties of the kingdom lay greatly at his mercy. The power and influence of the nobility had nearly perished in the contest of the two rival houses, while the commons had acquired no additional consequence or consideration by the depression of the peerage. The principles of a free government, however, remained, though sometimes unexerted, as a protection and safeguard to the people; and if, during the reign of Henry VII., the form of liberty was occasionally wounded by the hand of power, her spirit survived unhurt. Even at the very commencement of this reign, the supreme authority of parliament was clearly recognized by the act, which ordained, "by the assent of the lords, and at the request of the commons, that the inheritance of the crowns of England and France should remain in Henry VII., and the heirs of his body for ever." * So, in the passing of the statute 3 Hen. 7. c. 1., which has by some been supposed to be the origin of the court of star-chamber, another proof is to be found of the respect paid by this king to the authority of parliament, for though, as the fountain of justice, he might have claimed, as some of his successors did,

* Rolls of Parl. vol. vi. p. 270.

to erect a new judicature by his own royal power, yet he rather chose to obtain the sanction of parliament.

R. E.

Will you have the goodness to give me your opinion of the origin of the court of star-chamber, which seems a very perplexed matter?

SIR R. E.

When so many able writers and industrious antiquaries have differed on the subject, it is really very difficult to form any satisfactory opinion. It appears, as we have already seen, that in very early times the king used to administer justice in person, with the advice of those whom he selected as his council; but on the establishment of the ordinary courts of law, the judicial power was conferred on those tribunals, which thus became for these purposes the constitutional organs of the crown. In derogation, however, of this maxim, and in opposition to the principles of a free government, a practice certainly obtained throughout the earlier periods of our history, of occasionally dragging before the cognizance of the king's council, cases which ought to have been decided in the ordinary courts. With regard to the constitution of this body, and the extent of its jurisdiction, we have very imperfect information. It is called by Hale the king's *ordinary council*, and appears to have differed from the *privy council*, the

duties of which were simply to advise the king. The offences which were cognizable by the council, seem never to have been defined, and it is probable that its powers were chiefly exerted in cases which were deemed improper for the ordinary tribunals of justice. It thus became a most dangerous engine of state policy, and was generally applied as such. Of the illegality of such proceedings, little doubt can be entertained. A prosecution before this body was clearly against the provisions of *Magna Charta*, which enacted that no man should be imprisoned, &c. *nisi per legale judicium parium, vel per legem terræ*, and numerous statutes were passed to restrain the authority of the council. * The statute 3 Hen. 7., which has been considered by Sir E. Coke and others as a confirmation of the ancient authority of the council, seems to me rather to furnish an argument on the other side. That statute, after reciting certain public grievances, as unlawful maintainances, giving of liveries, &c. enacts, that the chancellor, treasurer, &c. calling to them a bishop and a *temporal lord of the privy council*, and the chief justices or other two justices, shall have authority to call the misdoers before them, and to punish them according to their demerits, after the form and effect of statutes thereof made, in like manner as if they had been convicted by due order of law. Now, if the

* 25 Ed. 3. c. 4. 28 Ed. 3. c. 3. 42 Ed. 3. c. 3. 4 H. 4. c. 23. Hale's Jurisd. of the Lords, p. 37.

council had, before this statute, the legal powers which it is supposed by some writers to have possessed, this enactment would appear to be altogether nugatory. The offences mentioned in the preamble are precisely those of which the council was accustomed to take cognizance; and therefore the erection, by an act of the legislature, of a similar summary jurisdiction for the trial of the offenders, seems to prove, beyond all doubt, that it was not considered expedient to prosecute them before the council. But it has been said, and the assertion is supported by the very grave authority of Sir Edward Coke, that the statute is declaratory of the jurisdiction of the council, which it confirms. There must, I think, be some error in this opinion; for not only is there no allusion to such a jurisdiction as that of the council in the statute, but the authority is conferred upon a different body of persons, only *one temporal lord of the privy council* being required to be a member of the new tribunal. Thus it appears that the character and power of the *council* (strictly so called), as a court of justice for the trial of offences, remained the same after as before the passing of this act, and that the arbitrary proceedings which took place in that court, during the reign of the Stuarts, were as illegal as they were impolitic and cruel.

Let us now proceed to the fiscal history of this reign. It cannot be supposed, that a prince of so avaricious a character as Henry would neglect

any feasible mode of transferring the riches of his subjects into his own exchequer. He accordingly put in motion a variety of oppressive engines, which the intricacies of the feudal system supplied; and by means of escheats, &c. wrung from the hands of his subjects considerable sums of money. He resorted also to that illegal method of raising supplies, which, as we have seen *, created so much discontent in the reign of Edward IV., and which was denounced by the statute of 1. Rich. 3. Upon two several occasions he raised a tax, under the name of a benevolence †, though in one of these instances he was compelled to apply to parliament, in order to inforce the payment of the sums which had been promised to him. ‡

R. E.

What were the spirit and temper of the commons during this reign?

SIR R. E.

For the most part they seem to have been sufficiently obedient to the king's wishes; and, indeed, it is probable that the influence of the court was employed at elections, to secure that object. Grafton, in speaking of the second parliament of Henry's reign, says, "He therefore summoned again his great court of parliament, whereto

* Ante, p. 77.
† Bacon's Hen. VII. p. 602. Brodie, vol. i. p. 255.
‡ Stat. 11 Hen. 7. c. 10.

he would that there should be elected the most prudent and gravous persons of every county, city, port and borough." * Nor were the peers either disposed or able to offer much resistance to the royal pleasure. Their numbers had been fearfully diminished in the struggles of the civil wars, and the king made it his especial care to prevent their acquiring the influence which riches bestow. In addition to this, the newly-erected court, of which we have spoken above, was employed in curbing the power of the nobility, by preventing that assemblage of retainers in livery, which in former times surrounded the more powerful barons with little armies. On every hand, therefore, the influence of the crown was strengthened during this reign; and if it was not exerted by Henry, in open and violent attacks upon the liberties of his people, it was because he professed rather the sordid temper of a miser than the audacious insolence of a despot. In some respects, the cause of freedom made progress. Commerce became more extended, and with it opulence, the sure forerunner of improvement. The decline of the feudal system was also favourable to the growth of general liberty.

* Pag. 857. Brodie, vol. i. p. 14.

CONVERSATION IV.

HISTORICAL SKETCH. — FROM THE REIGN OF HENRY VIII. TO THAT OF ELIZABETH.

HENRY VIII. — State of society. — Depression of the nobility. Character of the prerogative. — Commission to levy taxes without assent of parliament. — The king's influence over parliament. — Statutes regulating the succession. — Power given to Henry to will the crown, — and to promulgate proclamations with the effect of laws. — Conduct of the commons with regard to supplies. — Benevolence. — Loans. — Adulation of parliament. — The Reformation. — Courts of Justice. — EDWARD VI. — Hertford, protector. — Unconstitutional powers conferred upon him. — Repeal of obnoxious statutes of the last reign. — Statutes of treason. — Crown interferes in elections. — Mr. Hume's representations. — Character of the commons. — Storey's case. — State of the common people. — Martial law. — MARY. — Freedom of election invaded. — Administration of justice. — Martial law.

SIR R. E.

WE must now review a reign of considerable importance in our constitutional history; for the proper understanding of which, it will be essential shortly to advert to the situation of the country at the accession of the new sovereign. The people at large still remained in a state of great ignorance and depression. The art of printing had only

lately begun to be exercised, and education and intelligence were scantily spread through our population. Our commerce also was yet very limited, and the mass of the people were indigent as well as ignorant. The natural consequenc was, that they possessed but little power to resis the growth and supremacy of the prerogative, and that the crown was enabled to carry measures obnoxious to a great portion of the population, as in the case of the suppression of the monasteries, which was followed by a serious insurrection. In earlier times, as we have seen, the nobility formed an efficient counterbalance to the crown in the scales of the constitution; but, during the present reign, this weight was greatly deficient. The blood and treasure of most of our noble families had been shed and wasted in the civil wars, and the impoverished and dispirited aristocracy were in a state of thorough subjection to the court. Thus, unopposed on all hands, the power of the crown may appear, to a casual observer, to have been almost absolute.

R. E.

Can you tell us the number of the peers at the accession of Henry VIII.? I suppose it must have been small.

SIR R. E.

Dugdale * tells us, that in the first parliament

* Sum to Parl. p. 486

of this king, there were only thirty-six temporal peers.

Yet, supreme as was the authority of Henry, it differed widely in character from that of an absolute monarch; and the distinction between the English government, at this period, and the absolute sovereignties of Europe, was occasionally manifested, when the English monarch attempted, in some well-known point of constitutional right, to exceed the just limits of his prerogative. An instance of this occurred, when, for the purpose of raising monies for the invasion of France, Wolsey issued a commission to levy a supply without the consent of parliament. This arbitrary proceeding at once roused the high spirit of the English people. "The poor cursed," I use the words of Hall, a contemporary, "the rich repugned, the light wits railed, and, in conclusion, all people cursed the cardinal, as subverter of the laws and liberty of England; for they said, if men should give their goods by a commission, then were it worse than the taxes of France, and so England would be bond and not free." * The king, observing the dangerous opposition which the measure had raised, issued a declaration, "that he would demand no sum certain, but such as his loving subjects would grant to him of their own good minds." † But even this concession, by which Henry was contented to give his demand

* Hall, 696. † Id. 697.

the form of a benevolence, was unable to satisfy the jealousies of the nation, and the result was, that the attempt was wholly abandoned; "for well it was perceived," says Hall, "that the commons would none pay." *

H. E.

Was it by Wolsey's advice that the king made this dangerous experiment?

SIR R. E.

It was; and the cardinal, in excuse, alleged, that his counsel and the judges had said he might lawfully demand any sum by commission, and that the churchmen had encouraged him in the measure. †

The arbitrary authority of Henry had its origin chiefly in the influence which he had acquired over both the houses of parliament, an influence which he derived, not only from his own personal character, but, as I have already pointed out, from the particular circumstances in which the country was at that time placed. The ease with which he directed the counsels of parliament sufficiently appears from the variety of statutes which he procured to be passed for settling and resettling the succession of the crown ‡; by which, according to the whim of the day, he transferred the inheritance of the crown from one to another of his children at his pleasure. As these proceed-

* Hall, 700. † Ibid.
‡ 25 H. 8. c. 22. 28 H. 8. c. 7. 35 H. 8. c. 2.

ings, however, were under the sanction of parliament, whatever their impolicy might be, they were not unconstitutional; but the last of the statutes which thus regulated the succession was of a very different character, since it conferred upon the sovereign the extraordinary and extravagant power of limiting the descent of the crown by his last will and testament. This was a clear innovation upon the first principle of the constitution, which vests the power of altering and directing the succession of the crown in the king and both houses of parliament, and does not confer upon the king alone so enormous and dangerous a discretion. But a still more remarkable inroad was made upon the constitution by the two statutes of 31 H. 8. c. 8. and 34 H. 8. c. 23. By the first of these acts, the king, with the advice of his council, was authorised to promulgate proclamations, under such pains and penalties as might seem necessary; such proclamations to be observed in the same manner as acts of parliament, provided they should not be prejudicial to any person's inheritance, office, goods, or life. By the latter statute it was enacted, that a tribunal, consisting of nine privy counsellors, should have power to punish all transgressors of such proclamations.

R. E.

What is supposed to have given rise to these strange enactments?

SIR R. E.

In a letter from Bishop Gardiner, it is said that they originated in a decision of the judges, that the council could not punish certain merchants who had exported grain in defiance of a royal proclamation.* Those who favoured the bill, assigned as their reason, "that the king might not be driven to extend his royal supremacy;" but it did not pass "without many large words." In the first year of the following reign, the crown was deprived of this obnoxious power. You will not fail to bear in mind (for we shall have occasion hereafter to examine the effect and extent of the royal prerogative in respect of proclamations), that the passing of these acts, at a period when the monarchy was in its "high and palmy state," supplies the most convincing evidence that these royal edicts were never considered to have the effect of laws.

Although, throughout the whole of this reign, the commons displayed little disposition to oppose the designs of the court, yet, upon the question of supplies, they showed themselves, upon more than one occasion, tenacious of their privileges. In the year 1523, the treasury being exhausted by the king's extravagance, and a supply being required to prosecute the war with France, Wolsey carried down to the commons a royal message,

* Burnet, vol. ii. Rec. 114. Petyt's Jus Parl. p. 201.

demanding the then enormous sum of 800,000*l.*, being the fifth part of every man's lands and goods. The house, astonished at this demand, were silent; whereupon Wolsey, thinking, without doubt, to overawe them, exclaimed, "Masters, unless it be the manner of your house (as very likely it may), by your speaker only in such cases to express your mind, here is, without doubt, a most marvellous silence." Sir Thomas More, the speaker, endeavoured at once to appease the cardinal, and to convince him of the unusual and unconstitutional nature of the measure which he had adopted, assuring him, that his manner of coming thither was neither expedient nor agreeable to the ancient liberties of the house. Wolsey retired, but a few days afterwards again appeared, and attempted to reason with those members who had opposed the grant; but, being told "that it was the order of that house to hear, and not to reason, but amongst themselves," he again departed.*

We have seen, that in the early part of this reign, the attempt to enforce a compulsory supply from the people had failed, through the strong popular opposition with which the measure was met: but Henry, as he grew older, grew also more arbitrary; and, towards the close of his reign, again resorted to the same illegal proceeding. "In effect," says Lord Herbert†, "this bene-

* Kennet, vol. ii. p. 56. Cobb. Parl. Hist. vol. i. p. 485.
† Kennet, vol. ii. p. 249.

volence passed with much grudging." An attempt was made to resist it by some spirited citizens of London; but the court was not to be thus foiled, and Roach, an alderman of London, who had refused to contribute, was committed to prison for three months, on a charge of seditious words; while Reed, another alderman, for similar contumacy, was sent to serve in the army against the Scots, and, being taken prisoner, was compelled to pay a heavy ransom.*

R. E.

I think Mr. Brodie says that this attempt was unsuccessful, and that Henry was obliged to apply to parliament for an authority to levy the sums proposed, and that, accordingly, an act of parliament was passed for the purpose. †

SIR R. E.

I am much obliged to you for your reference to that very important fact, which proves that even Henry VIII., the most powerful of our kings, was unable, on this occasion, to break through that grand constitutional maxim, that the people can only be taxed by the assent of their representatives in parliament.

Before we dismiss the subject of illegal taxation, I ought to notice the system of exaction, which was practised by Henry, of procuring money from his

* Kennet, vol. ii. p. 249.

† Brodie, vol. i. p. 255. citing Stat. of the Realm, vol. iii. p. 625.

subjects by way of loan. A large sum of money having been raised by this mode, an act of parliament was procured (35 Hen. 8. c. 12.), by which, not only was the king discharged from the repayment of the money so borrowed (an act of gross injustice), but if the debt had been paid, the unfortunate creditor was compelled to refund it into the exchequer!

R. E.

Henry seems to have held his faithful commons in a state of great subjection. Dr. Lingard gives an amusing account of the reverence, or rather the adoration, with which the monarch was received when he appeared in person before his parliament. "The parliament as often as it was opened or closed by the king in person, offered a scene not unworthy of an oriental divan. The form, indeed, differed but little from our present usage. The king sat on his throne, on the right-hand stood the chancellor, on the left the lord treasurer, while the peers were placed on their benches, and the commons stood at the bar. But the addresses made on these occasions by the chancellor, or the speaker, usually lasted more than an hour; and their constant theme was the great character of the king. The orators, in their efforts to surpass each other, fed his vanity with the most hyperbolical praise. Cromwell was unable, he believed all men were unable, to describe the unutterable

qualities of the royal mind, the sublime virtues of the royal heart. Rich told him, that in wisdom he was equal to Solomon; in strength and courage, to Sampson; in beauty and address, to Absalom; and Audley declared, before his face, that God had anointed him with the oil of wisdom above his fellows, above the other kings of the earth, above all his predecessors; had given him a perfect knowledge of the Scriptures, with which he had prostrated the Roman Goliath; a perfect knowledge of the art of war, by which he had gained the most brilliant victories at the same time in remote places; and a perfect knowledge of the art of government, by which he had for thirty years secured to his own realm the blessings of peace, while all the other nations of Europe suffered the calamities of war. During these harangues," continues Dr. Lingard, "as often as the words 'most sacred majesty' were repeated, or as any emphatic expression was pronounced, the lords rose, and the whole assembly, in token of respect and assent, bowed profoundly to the demi-god on the throne."

SIR R. E.

The scene is a very characteristic one. The poet has said,

"There's a divinity doth hedge a king,"

and certainly never in this country was the maxim more aptly illustrated than during the reign of

F 3
27631

Henry VIII. The abstract idea of a king, (if, like Martinus Scriblerus, you could divest him of the externals of royalty,) was never so vigorously impressed upon the minds of the people as at this period. Not only was the king's name a tower of strength, but a sound of awe and terror to all ears. The people had not yet emerged from that state of depression in which they must always exist, until intelligence and riches raise them to importance. In the king's mouth they were as yet but "brute beasts," and their representatives nothing better than "varlets;"* but the period was rapidly approaching when they were to assume a new character.

R. E.

Do you not think that the Reformation added greatly to the royal authority?

SIR R. E.

It certainly did; and in that view only does it come within the scope of our enquiries. The effect of that great revolution was to vest in the king, as supreme head of the church, that sovereign authority in spiritual, which he before possessed in temporal matters. The exercise of power, whatever be the subject upon which it operates, will necessarily generate respect and awe in the minds of the vulgar; and when Henry, in his character of a spiritual sovereign, sate in

* Lingard, vol. iv. p. 360. 4to edit.

judgment upon the wretched Sabbatarians, the spectacle, without doubt, impressed upon the minds of those who witnessed it, a salutary dread of the royal judge. The treasures, also, which the king's coffers derived from the suppression of the monasteries, contributed to increase the influence of the court; while the terrible examples which were made of those who denied the supremacy, manifested both the power and the cruelty of the king. To deny Henry's supremacy as head of the church, was a constructive treason, for which some of the best and wisest men in the country, paid the penalty of their lives.

The annals of our courts of law furnish innumerable instances of Henry's unsparing cruelty. The judges were anxious to fulfil the wishes of the crown, and the juries, if they ventured to return an honest verdict, were not unfrequently threatened by the court. But measures, even more iniquitous than these, are to be found in the bills of attainder, which were so numerous during the latter part of the reign, and by which the crown, with the assistance of an obsequious parliament, was enabled to destroy an obnoxious individual, without affording him an opportunity for making a defence. "It is a blemish," says Burnet*, "never to be washed off, and which cannot be enough condemned, and was a breach of the most sacred and unalterable rules of justice, which is capable of no excuse. It was

* Hist. of Ref. cited 1 St. Tr. 481.

the attainting of some persons whom they held in custody without bringing them to a trial." In this manner perished the venerable Countess of Salisbury, whose execution has left upon the memory of Henry the darkest stains of disgrace. I rejoice that we have now reached the termination of this reign, upon the history of which I can never dwell with pleasure. Fortunately, the principles of liberty, though apparently forgotten, were not dead in the minds of the people, and notwithstanding all the despotism of Henry, they lived to animate the bosoms of those who, in the next age, fought the great fight of the people against the throne.

The reign of Edward VI. does not furnish much matter to the enquirer into our constitutional history. The commencement of that reign was chiefly remarkable for the intrigues of the persons who had been appointed executors under the will of the late king, and to whom had been confided (by authority of the stat. 28 Hen. 8.), the administration of the government, until the young king should attain his eighteenth year. Those intrigues terminated, as you may remember, in the appointment of Hertford, the king's uncle, to the office of protector. To gratify the ambition of this man, a most extraordinary and unconstitutional power was conferred upon him, by a commission under the great seal, which in fact transferred to him the whole kingly power during the minority of the

new sovereign.* Under the authority of the protector a parliament was soon convoked, the proceedings of which were, upon the whole, highly creditable to the good sense of the government, and the spirit of the people. The various new treasons which had been created in the course of the last reign were abolished, and the law of treason was restored to the state in which it stood on the passing of the celebrated statute, 25 Edw. 3.† So also the extravagant statute, by which, as we have seen, a species of legislative effect was given to the king's proclamation, was repealed.‡ By the same act, two witnesses were rendered necessary to substantiate a conviction for treason. A statute was also passed conferring upon the crown the revenue of tonnage and poundage, in the preamble of which the ancient doctrine was fully recognized, that the crown received these supplies from the commons, by authority of parliament.§ Thus did the constitution in part recover from the attacks which it had suffered during the preceding reign.

H. E.

But were there not some harsh statutes with regard to treason passed during this reign?

SIR R. E.

The controversies on religious subjects, and the desire of supporting the king's supremacy as head

* Burnet's Ref. vol. ii. Rec. No. 6. † 1 Ed. 6. c. 12.
‡ 1 Ed. 6. c. 12. § 1 Ed. 6. c. 13.

of the church, led to the introduction of a statute *, by which, to affirm in words that the king was a heretic, tyrant, or usurper, was on the second offence declared to be treason, and if affirmed in writing, printing, &c. was treason in the first instance; certainly, a very harsh and cruel enactment.

R. E.

I presume that the commons, in this reign, as during the last, were tolerably obedient to the royal wishes.

SIR R. E.

Considerable pains were taken by the crown that they should be so. Previously to the assembling of a new parliament, in 1552, a letter was despatched from the king to the sheriffs of various counties, commanding them to give notice to the freeholders and burgesses, that the royal pleasure was, that they should choose and appoint men of knowledge and experience. This singular document concludes as follows: "Nevertheless, our pleasure is, that where our privy council, or any of them, within their jurisdictions in our behalf, shall recommend men of learning and wisdom, in such case their directions be regarded and followed, as tending to the same which we desire; that is, to have this assembly to be of the most chiefest men in our realm for advice and good council."† "Let-

* 5 & 6 Ed. 6. c. 11. † Strype's Eccl. Mem. vol. ii. p. 394.

ters also," continues the historian who has preserved this document, "were sent from the king to some of the high sheriffs, recommending therein persons to them to be elected knights; as one to the sheriff of Hampshire, for the electing of Sir Richard Cotton to be one of the knights of that shire. The like letter to the sheriff of Suffolk, for the electing of Sir William Drury, &c. &c.; and these were such as belonged to the court, or were in places of trust about the king." Hume has termed this "an expedient, which could not have been practised, or even imagined, in an age when there was any idea or comprehension of liberty;" and he adds, that "it is remarkable, that this attempt was made during the reign of a minor king, when the royal authority is usually weakest, that it was patiently submitted to, and that it gave so little umbrage as scarce to be taken notice of by any historian." Now, it is clear from several instances which I have already mentioned, that this interference on the part of the crown with the election of the commons, was by no means so rare a measure as the historian seems to imagine. When the court depended for its revenue upon the commons, it is not wonderful that means were taken to procure the return of men who should be willing to supply the royal necessities, and I do not believe that there ever was, at any period of our annals, a time when the crown did not, either directly or indirectly, endeavour to acquire an influence in

the choice of the people's representatives. During the earlier periods of our history, this influence appears to have been exerted more openly than in modern times, but to assert, that "no idea or comprehension of liberty" could exist in the reign of Edward VI., because the king recommended certain persons to be knights of the shires, is as unfounded a proposition as to maintain that we are at the present moment in a state of complete servitude, because government nominates the representatives of a certain number of boroughs.

In fact, the commons at this period had not that high sense of their own importance, which, at the commencement of the next century, they rightly began to entertain. Even the great principle of freedom of speech was not wholly understood, as will appear from the following incident. During a debate in the commons, on the Book of Common Prayer, a member, whose name was Storey, spoke, we are told, so sharply against the bill, and was so free of his reflections on the king and the protector, that he was put into the serjeant's hands, and sent to the Tower. The words he spoke were these: "*Woe unto thee, O England, when thy king is a child!*" For this offence an impeachment was actually contemplated; but, upon his humble submission, the house ordered the privy-councillors to acquaint the protector that it was their resolution he should be discharged, and they desired that the king would *forgive his*

*offence against him and the council.** But shall we conclude, with Mr. Hume, that because the house of commons displayed an unbecoming desire to appease the court, there was no idea of freedom existing in the country? Had the government attempted to extort a subsidy from the people without the assent of parliament, it would soon have appeared that the free spirit of the nation was not extinct.

R. E.

I suppose the state of the common people, at this period, was still very low, though, I believe, there were few to be found in the actual condition of bondmen, or villeins, as they were called.

SIR R. E.

Sir Thomas Smith, who was secretary of state to Edward VI., tells us, that in his time he never knew any villeins in gross (that is, bondmen, liable, like slaves, to be sold and disposed of at the will of their owners), and that villeins regardant (or bondmen attached to the soil, and only to be disposed of with the estate), were so few, that they were hardly worth mentioning.† The estimation in which the common people were held, may be judged of by a reference to the statutes passed during this reign against vagabonds and paupers, from which we may learn, that the persons and

* Parl. Hist. vol. iii. p. 236.
† Commonwealth of England, p. 249. ed. 1635.

liberty of the lower orders were not greatly regarded. By 1 Edw. 6. c. 3. it was enacted, that if any man or woman, able to work, should refuse to labour, and live idly for three days, that he or she should be branded with a red-hot iron on the breast, with the letter V., and should be adjudged the *slaves* for two years of any person who should inform against such idler. And the master was directed to feed his slave with bread and water, or small drink, and such refuse meat as he should think proper, and to cause his slave to work by beating, chaining, or otherwise. If he ran away from his master for fourteen days he was to become his slave for live, and on a repetition of the offence the penalty was death.

H. E.

What inhuman provisions! I hope the statute was speedily repealed.

SIR R. E.

It only existed for about two years. The depression and poverty of the people, at this period, may also be calculated by a reference to the number of criminals; for the amount of crime, and the degree of want in a country, will always be found to preserve a tolerably even ratio. It is stated by one writer *, that during the reign of Henry VIII., "72,000 great and petty rogues were put to death." Even during the reign of

* Harrison's Description of England, p. 186.

Elizabeth, the number of vagrants in and near London, whose violence and depredations were much feared, was enormous.* The number of unemployed persons, while the population was yet scanty, is a strong proof of the poverty of the country, and that manufactures, and the industry consequent upon their introduction, had made but little progress, a fact which is also proved by the decay of the towns. You will find a more particular account of the state of the country at this time in the Introduction to Mr. Brodie's History. I call your attention to these facts, because, in studying the history of the constitution, it is impossible to trace its progress and changes with accuracy, unless we are acquainted with the various circumstances which contributed to give power and importance to the different branches of which the government is composed. A reference to the tumultuous and disorderly state of the population at this period will also serve to explain a very severe and extraordinary proceeding on the part of the government, which took place during the reign of Edward. "In 1552," says Mr. Hume, "when there was no rebellion or insurrection, King Edward granted a commission of martial law, and empowered the commissioners to execute it, as should be thought by their discretions most necessary." It appears clearly, however, that this commission issued in conse-

* See Ellis's Historical Letters, 1st series.

quence of popular disturbances and tumults, which assumed the aspect of rebellion *; and the character, therefore, of the measure, differs widely from that which Mr. Hume would give it, who would persuade us, that in time of profound peace and tranquillity the court resorted to this highly arbitrary proceeding, in the mere wantonness of prerogative.

Let us now proceed to the reign of Mary, which will not detain us long. The chief feature by which it is distinguished, the religious contests and persecutions which took place, we shall only have occasion to notice for the purpose of showing the influence which they exerted on the conduct of the queen towards the house of commons. In order to secure a powerful party there, and thus to have the sanction of parliament for the restoration of the ancient faith, no pains were spared by the court to influence the elections of the commons. The two first parliaments not being sufficiently obedient to the royal wishes, a third was summoned in 1554; in contemplation of which the queen addressed a letter to the Earl of Sussex, begging that he would admonish her good subjects, who had a right to elect the members, to choose men of the wise, grave, and catholic sort.† "So careful," says Burnet, "was that lord to merit the continuance of the

* Strype's Eccl. Mem. vol. ii. p. 373. 458. Brodie, vol. i. p. 214.
† Burnet's Reform. vol. iii. p. 228. 554.

queen's confidence, that he wrote to the gentlemen of the county to reserve their voices for the person whom he should name, and also wrote to the town of Yarmouth for a burgess." Like her brother *, the queen also despatched letters to the sheriffs to the same purport as that which she addressed to Sussex.† In many places, we are told, the members were chosen by force and threats; in others, the emissaries of the court violently prevented the electors from exercising their franchise, while in many instances false returns were made.‡ When the question of the queen's marriage was about to be debated, Gardiner, we are told, had before hand prepared the commons, by giving the most considerable of them pensions, some 100*l.*, some 200*l.* a year.§ In the succeeding reign, it was said by a member of the commons, "that in Queen Mary's time, a council of the realm, not the queen's privy council, did write to a town to choose a bishop's brother, and willed them to choose to the like of him some other fit man; but the council was answered with law."‖ It is obvious, from these proceedings, that the power of the commons at this period was such, that the court considered it most material to secure a majority of their

* Ante, p. 106.
† Strype's Eccl. Mem. p. 155.
‡ Burnet's Hist. Ref. vol. ii. p. 282.
§ Id. p. 277.
‖ D'Ewes's Journal, p. 170.

voices, while at the same time it is equally obvious that the privileges of the house were not as yet so well defined nor so jealously guarded, as they both deserved to be, and soon afterwards were. Another instance which I shall mention will exemplify this in a still stronger light. At the close of the session of parliament in 1554, the queen prohibited the members from separating without licence; notwithstanding which, thirty-seven members of the commons absented themselves, for which act, contrary to all parliamentary usage, an information was exhibited against them in the King's Bench by the attorney-general, but was not proceeded in.* There is no doubt that this was a high breach of privilege; and yet we do not find that the commons vindicated their rights, as a proper sense of their own dignity would have demanded.

H. E.

Did the crown, during this reign, interfere in the administration of justice?

SIR R. E.

In one case most grossly; Sir Nicholas Throckmorton was indicted for high treason, as having been engaged in the insurrection of Wyat, and was acquitted contrary to the opinion of the court. For this offence the jurors were summoned before the council, and those who did not confess their

* Strype's Eccl. Mem. vol. iii. p. 165. Coke's Inst. vol. iv. p. 17.

fault were committed to the Fleet, and heavily fined; a most iniquitous proceeding, which operated so effectually upon the minds of the jury who tried Sir John Throckmorton, soon afterwards, that he was found guilty upon the same evidence upon which his brother had been acquitted.*

R. E.

After this, one cannot but admire the holiday speech of Mary to Morgan, on his appointment to the office of chief justice of the Common Pleas, which is cited by Dr. Lingard as a proof of the queen's "solicitude for the equal administration of justice." "I charge you, sir," said she, "to minister the law and justice indifferently, without respect of persons; and, notwithstanding the old error among you, which will not admit any witness to speak, or other matter to be heard, in favour of the adversary, the crown being a party, it is my pleasure, that whatever can be brought in favour of the subject may be admitted and heard. You are to sit there, not as advocates for me, but as indifferent judges between me and my people."

SIR R. E.

It appears from Sir Thomas Smith, that the practice of citing jurors before the council for giving wrong verdicts (as alleged), though not unfrequent, was, even at this time, "accounted very violent, tyrannical, and contrary to the liberty and

* Holingshed, vol. iii. p. 1121. 1126. St. Trials, vol. i. p. 902.

custom of the realm of England." * Of an equally arbitrary character was the proclamation issued by Mary in 1558, towards the end of her reign, against books of heresy, treason, and sedition, declaring, that whosoever had any of these books, and did not presently burn them, should be esteemed rebels, and, without any further delay, be executed by martial law. Upon this proclamation, which Mr. Hume calls the employment of martial law in defence of orthodoxy, it has been very properly observed, that it does not appear to have been acted upon, nor even to have been followed by any commission of martial law, and that its denunciations were only *in terrorem*, and not meant to be carried into execution; a royal stratagem by no means uncommon at this period of our history. † At the same time, it cannot be denied, that many acts of Mary's reign were of a highly arbitrary character, and that the crown, at that period, assumed powers both at variance with the spirit of our constitution, and with the well-being of a free state. So grievous had the proceedings of the court become towards the close of this reign, that had they been long continued, resistance must have followed.

* Commonwealth of Engl. b. 3. c. 1.
† See Brodie's Hist. vol. i. p. 209.

CONVERSATION V.

HISTORICAL SKETCH. — ELIZABETH.

ELIZABETH.— Misrepresentations of the constitutional history of her reign.—Mr. Hume.—Star Chamber—Court of High Commission. — Martial law. — Arbitrary imprisonment. — Use of torture.—Power of impressment.—Illegal taxation.—Other arbitrary proceedings. — Proclamations. — Mr. Hume's comparison of England with Turkey. — Character of parliaments. — Freedom of election invaded. —Mr. Strickland's case.—Mr. Wentworth's case. — Generally received notions of the prerogative. — Distinction between the government of Elizabeth and a despotism.

SIR R. E.

TO-DAY we have a serious task before us.

R. E.

You mean the reign of Elizabeth.

SIR R. E.

I do. And there has been so much misapprehension with regard to the constitutional history of this reign, that we must examine it somewhat critically. Hume tells us that a great mistake had long existed on this subject, amongst the persons who extolled the wisdom and virtue of Elizabeth,

and who maintained that she manifested a regard for the constitution, and a concern for the liberties and privileges of her people. — "But as it is scarcely possible," continues the historian, "for the prepossessions of party to throw a veil, much longer, over facts so palpable and undeniable, there is danger lest the public should run into the opposite extreme, and should entertain an aversion to the memory of a princess who exercised the royal authority in a manner so contrary to all the ideas which we, at present, entertain of a legal constitution. But Elizabeth only supported the prerogatives transmitted to her by her immediate predecessors. She believed that her subjects were entitled to no more liberty than their ancestors enjoyed. She found that they entirely acquiesced in her arbitrary administration, and it was not natural for her to find fault with a form of government by which she was herself invested with such unlimited authority. In the particular exertions of power, the question ought never to be forgot,— *what is best?* But in the general distribution of power among the several members of a constitution, there can seldom be admitted any other question than — *what is usual?* Few examples occur of princes who have willingly resigned their power. None of those who have, without struggle and reluctance, allowed it to be extorted from them. If any other rule than established practice be followed, factions and dissensions must multiply with-

out end; and though many constitutions, and none more than the British, have been improved even by violent innovations, the praise bestowed on those patriots to whom the nation was indebted for its privileges, ought to be given with some reserve, and surely without the least rancour against those who adhered to the ancient constitution." The historian then proceeds to illustrate this theory by a reference to the history of the time. I have read—

R. E.

Before you proceed further, will you allow me to ask what is the meaning of Hume, when he says, that the "praise bestowed on those to whom the nation is indebted for its privileges, ought to be given with some reserve?"

SIR R. E.

I acknowledge that the remark does not seem consistent with the writer's theory. If the patriots, whom he mentions, ventured against the well-established and acknowledged prerogatives of the crown, to assert the privileges of the people, even in the face of long-continued usage, it would seem to me that their merit was thereby doubly enhanced, since it required a double portion of wisdom and valour to achieve the glorious task:—I was going to observe to you, that I have read the whole of the above passage to you, because it contains, in a succinct form, a tolerably complete

sketch of Mr. Hume's theory of our constitution, the correctness of which, since it passes so generally current, it is most desirable to examine. In the performance of this labour we shall be greatly assisted by a reference to Mr. Brodie's excellent Introduction to his History, where the arguments of Hume are critically discussed. You will observe, that the grand assertion of the historian is, that Elizabeth *only supported the prerogatives transmitted to her by her immediate predecessors*. Upon that question we will join issue with Mr. Hume, and examine his arguments in the order in which he has stated them. The first instrument of arbitrary power which he notices is, the court of star-chamber, of the origin and progress of which we have already spoken. That this tribunal, even as exercised under Elizabeth, and before it aimed at the extravagant pretensions which distinguished it in the two succeeding reigns, was incompatible with a full and perfect liberty, I cannot deny. The judges in it were the council, the king's own servants and advisers; and its jurisdiction was so ill-defined, that even Sir Edward Coke has not ventured to assign its limits. "Herein," says that learned writer, "the surest rule is, that seeing it is an ancient court, the precedents of the court are to be followed, and the rather for that the court consisteth of such learned and honourable judges." * The mystery in which the powers of this court

* Coke's 4th Inst. fol. 66.

were involved, rendered it a most efficient instrument of arbitrary designs, to which it had been but sparingly devoted in the time of Elizabeth's predecessors. The fact, that Sir Edward Coke sate as a judge in that court, and recognised its legality, is sufficient to show how powerful an engine it was capable of being made. The next grievance of which Mr. Hume complains, is the court of high commission.

Having undertaken the task of establishing the reformed faith, Elizabeth thought it necessary to arm herself with sufficient powers to carry through this great work; and, accordingly, in the first act of her reign *, whereby the spiritual jurisdiction was restored to the crown, a power was given to the queen to authorise certain commissioners to visit, reform, order, or correct any errors, heresies, schisms, abuses, &c. This was the origin of the court of High Commission, which, in the course of the two succeeding reigns, was converted into a most dangerous instrument of arbitrary power. Although the statute gave no power either to fine, imprison, or inflict corporal punishment, the commissioners did not scruple to impose those penalties; but, during this reign, such sentences appear to have been passed rather *in terrorem* than with any view of their being carried into strict execution; for we are told by Sir Edward Coke, that though fines were imposed,

* 1 Eliz. c. 1. § 36.

they were not levied, or any subject in his body, lands, or goods, charged therewith."* The high commissioners, according to the same writer, knowing the weakness of their authority, kept their commission secret, and their usurped jurisdiction was never recognised in the courts of law. Indeed, in one instance, the judges openly discountenanced it; for when a pursuivant, under a warrant from the commissioners, attempted to ransack a house, and was killed by the owner, it was adjudged not to be murder, and the man was dismissed.† But we shall see how this jurisdiction extended itself in the two ensuing reigns.

The employment of martial law by Elizabeth is, according to Mr. Hume, another proof of her arbitrary government. "Whenever there was any insurrection, or public disorder, the crown employed martial law, and it was, during that time, exercised not only over the soldiers, but over the whole people. Any one might be punished as a rebel, or as an aider and abettor of rebellion, whom the provost martial, or lieutenant of a county, or their deputies, pleased to suspect. * * * Queen Elizabeth was not sparing in the use of this law." That the crown assumed to have authority to punish by martial law cannot be denied; but it is singular that the historian, although he adduces several instances in which such a proceeding was threatened, has been un-

* Coke's Fourth Inst. p. 332. † Ibid.

able to bring forward one single case in which it was actually carried into effect. On the contrary, it appears, in three out of the five instances which he cites as his authorities, that martial law was actually *not* executed. The other two instances are not more successful. The first is a proclamation against bulls and libels, with the penalty of martial law attached to it*; but this penalty, like that in a similar proclamation of Queen Mary, appears to have been inserted merely *in terrorem*. Lastly, we have the commission of martial law granted to Sir Thomas Wilford, in consequence of the great popular disturbances in and near London; but it appears that Sir Thomas was so well aware of the illegality of this commission, that, having captured some of the chief rioters, he delivered them up to the ordinary courts, instead of executing justice upon them himself.†

H. E.

What do the lawyers of that day say on the subject of martial law?

SIR R. E.

Sir Edward Coke condemns it, when thus applied, in the clearest terms. "If a lieutenant or other that hath commission of martial authority in time of peace, hang, or otherwise execute, any

* Strype, Ann. vol. iii. p. 570.
† See Brodie's Hist. vol. i. p. 226.

man by colour of martial law, this is murder, for this is against *Magna Charta*." *

Arbitrary imprisonment, by the orders of the court, is another proof brought forward by Mr. Hume of Elizabeth's despotism. "There was a grievous punishment very familiarly inflicted in that age, without any other authority than the warrant of a secretary of state, or of the privy council, and that was, imprisonment in any jail, and during any time that the ministers should think proper." That, at a period so productive as the reign of Elizabeth in treasonable plots, the liberty of the subject should have been occasionally infringed, by the directions of government, cannot be either marvelled at or doubted; but that this measure was "familiarly" resorted to as a punishment," distinct from a cautionary proceeding, is, I believe, incapable of proof. On the contrary, the power of the queen, or her council, to commit to custody, *without cause assigned*, was expressly denied by the judges. †

R. E.

But, although the practice was illegal, yet may it not, in fact, have existed? which would be sufficient for Mr. Hume's argument. He does not say that it was *legal*, but that it was *usual*.

SIR R. E.

I do not think that it would be sufficient. He

* Coke's Second Inst. p. 52. † Anderson's Rep. p. 298.

launches his argument with the assertion, that "Elizabeth only supported the prerogative transmitted to her by her immediate predecessors;" and, surely, *that* cannot be called a *prerogative*, which is openly denied to be such by the constitutional legal advisers of the crown. If, after this declaration of the judges, Elizabeth persisted in committing her subjects, without cause specified, she must have known that she was guilty of an act of despotic authority, denounced by the laws: and of what value, I would ask you, is the authority of such an act, and what subsequent sovereign could be justified by such a precedent? An act of power acquiesced in, or not disputed, however injurious, may give the specious appearance of a right to the crown, but a measure, clearly adjudged to be wrongful and illegal, can never be cited except for the purpose of reprobation. Of the same character is the charge made by Mr. Hume of the use of torture by Elizabeth's government. Now, if there be one point in our legal history clearer than another, it is this; — that never at any period was the use of torture, either as an engine of penal law, or of state inquisition, acknowledged in this country. "There is no one opinion in our books on judicial record," says Sir Edward Coke, "that we have seen, or remember, for the maintenance of tortures, torments," &c. * It cannot be denied that, during the reign of

* Coke's Third Inst. p. 35.

Elizabeth, the rack was used to extort secrets of state —

H. E.

I think Mr. Ellis, in his Collection of Historical Letters, has published one of the warrants from Burleigh, authorising the use of the rack.

SIR R. E.

I believe he has. And, indeed, Burleigh, in his "Declaration of the favourable dealing of her majesty's commissioners appointed for the examination of certaine traytours," has acknowledged that some few had been "gently racked." But we are not to judge of the actual state of the constitution at this period by certain acts done in secret by the government, under an evident impression of their illegality. They do, indeed, afford cogent arguments to prove that the court was greatly inclined to arbitrary courses, but they do not prove the non-existence of a free constitution at this time, which Mr. Hume would have us infer. But I shall have occasion, when we conclude this catalogue of grievances, to enlarge a little more upon this subject.

H. E.

What is the next of the historian's grievances?

SIR R. E.

The power of impressment, and of "obliging any person to accept of any office, however mean

or unfit for him, was another prerogative," says Mr. Hume, "totally incompatible with freedom." The power of impressment for the sea-service still remains, and unless we maintain that we are at present in a state of servitude, we cannot assent to Mr. Hume's proposition. The *prerogative*, as Mr. H. terms it, of obliging any person to accept any office, however unfit for him, had never an existence; and so far as I know, Elizabeth was never guilty of such a practice, though an accusation to that effect has found a place in Osborne's writings, the authority of which, as Mr. Brodie justly observes *, is little to be regarded.

On the subject of illegal taxation during the reign of Elizabeth, Mr. Hume is not more successful than in the other parts of his argument. At no period did the queen assume or claim the privilege of raising money without the assent of parliament; though, as many of her predecessors had done, she borrowed from her subjects, under a promise of repayment. With regard to Benevolences, strictly so called, it does not appear that the queen ever attempted this mode of supplying her exchequer; though parliament, in the year 1586, presented to her a contribution of money, which had been freely raised among their own members. † Another mode of illegal taxation,

* Brodie's Hist. vol. i. p. 247.
† D'Ewes's Journal, p. 386. 390.

during this period, is said, by Mr. Hume, to have been the increasing the customs by order of council, without the assent of parliament. During the last reign the customs upon the exportation of raw wool being much more productive than the customs upon woollen cloth, Mary, in order, as it was alleged, to equalize the duties, laid, by her own authority, an additional assessment upon the cloth. Soon after the accession of Elizabeth, the merchants complained loudly of this proceeding; "and they made suit," says Dyer, in his Reports, "to the queen to be unburthened of this impost, because it was not granted in parliament."* No judicial opinion, however, was given.

On the subject of the other arbitrary proceedings during the reign of Elizabeth, Mr. Hume has been answered most successfully by the industry of Mr. Brodie, to whose pages I would refer you. I fear we cannot afford to enter into the details of these arguments; but the examination into which we have already gone will be sufficient to show how extremely erroneous and overcharged are Mr. Hume's statements. What, for instance, can be more grossly incorrect than the allegation that, "in reality, the crown possessed the full legislative power, by means of proclamations, which might affect any matter, even of the greatest importance, and which the star-chamber took care to see more vigorously

* Dyer, p. 165. b.

executed than even the laws themselves." Have we not seen, that in the reign of Henry VIII. the prerogative of the crown, in this respect, was so well known to be limited, that when the king desired an extension of it, it was thought necessary to apply to parliament for that purpose; and that even then the authority was granted with great reservations.* Have we not seen, too, that that act was repealed in the following reign, and the prerogative thereby reduced to its original limits? And yet we are told that Elizabeth "possessed the full legislative power by means of proclamations." Why, then, did she assemble her parliaments, and why did she assume to share her legislative authority with a body of her subjects? The position is most unfounded.

R. E.

Does not Mr. Hume compare England at this time to Turkey?

SIR R. E.

He does: and that comparison may be considered as the result of his argument. "The government of England in that age, however different in other particulars, bore, in this respect, some resemblance to that of Turkey at present. The sovereign possessed every power, except that of imposing taxes." Now this picture is so grossly over-coloured, as entirely to defeat the

* Ante, p. 96.

historian's object. In Turkey, the will of the sovereign is law. In England, at the period in question, the will of the sovereign was not law, for there existed a system of laws applicable not only to the relation of subject and subject, but to the relation of sovereign and subject. In Turkey, if a man plotted against the sultan's life, the latter might, and doubtless would, inflict the summary punishment of decapitation; but in England, the traitor could only have been tried and punished according to the forms of law. Now, let me illustrate this with an historical anecdote. A man of the name of Blosse was apprehended for affirming that Edward VI. was alive in Flanders, and that Queen Elizabeth had been married to Leicester, and had borne him four children. This, as the historian says, was such a piece of impudence, that it could not but be taken notice of.* Well, what would they have done with him in Turkey? Impaling or beheading, without farther ceremony, might have befallen him; or, at all events, he would not have escaped with his eyes. How was he disposed of in England? He was brought before Fleetwood, the recorder of London, who examined him, and then addressed the following letter to Burleigh. Is it probable that the cadi would have transmitted a similar communication to the vizier? —

"My very good lord. This is the examination

* Strype's Annals, vol. ii. p. 240.

of Robert Blosse. And because I had studied all the statutes of treasons, and could not find him within the letter or meaning of them; and for that the fellow, which was executed in Queen Mary's time, did offend in saying that he himself was king Edward, therefore I noted that cause to be treason. But not so of Blosse's case. I, therefore, yesternight, did argue the case with Mr. Attorney General, by the space of an hour or more, for a clear case, to be no treason. And for the second cause he should have lost one of his ears, if he had been convicted within three months. But now that time is past, and therefore by the statute he ought to be set at liberty, and so thought Mr. Attorney."*

H. E.

Do you remember the account which is given in that most amusing work, the "Sketches of Persia," of the King of Persia's inquiries into the nature of our monarchical government?

SIR R. E.

No, I do not. Can you remember it?

H. E.

I must relate the anecdote from memory:— When the envoy, Sir John Malcolm, had satisfied his majesty's curiosity, "It is very well," said the latter: "I see how it is; your king is only the first magistrate of the country. That may be

* Id. Append. No. 25.

all very well for the people, but the king can find little pleasure in such authority: now, with me it is quite a different thing. You see, standing there, Solyman Cagi Khan, and several of the principal chiefs of my empire: now, if I please, I can immediately order all their heads to be chopped off. Can I not?" said he, turning to the crouching nobles. "Certainly, if it be your pleasure, Point-of-the-adoration-of-the-world!" was the courtier's reply.

SIR R. E.

Thank you; it is a good illustration of the correctness of Mr. Hume's comparison. Imagine Elizabeth explaining the nature of her authority to the Muscovite ambassador, and pointing to Lord Burleigh, with the pleasing hint, that if she were so minded, his head must fly from his shoulders.

R. E.

You promised not long since, to explain more particularly the view which you take of the arbitrary proceedings of this reign, the existence of which to a certain extent you admit.

SIR R. E.

The distinction which I wish you to observe, is that between a purely arbitrary government, like that of Turkey, and a limited government like that of England, under Elizabeth, though characterised by arbitrary measures; but this discussion must

be deferred till the conclusion of our morning's conversation.

Let us now examine the history and character of parliament during this reign. If we are to believe Mr. Hume, this body was altogether powerless and insignificant. "The parliament," says he, "*pretended* to the right of enacting laws, as well as of granting subsidies, but this privilege was during that age still more insignificant than the other. Queen Elizabeth expressly prohibited them from meddling with state matters, or ecclesiastical causes; and she openly sent the members to prison who dared to transgress her imperial edict in this particular." That the queen herself did not think the commons so insignificant an assembly, appears from the anxiety manifested by the court to secure the return of persons favourable to the royal interests. At the commencement of this reign Elizabeth adopted the unconstitutional course to which her brother and sister had resorted, in order to influence the elections, of transmitting letters to the sheriffs. Under the date of January 7th, 1558, Strype says,* "Letters were despatched from the council to Thomas Mildmay, Esq. high sheriff of Essex, touching the choosing of knights of that shire, at the next county court, according to the minutes in the council chest;" and an anonymous writer tells us, that "the commons, consisting of burgesses, &c. were not freely, and according to

* Annals, vol. i. p. 33.

form of law elected, but the county was necessitated to chuse one of five, who were nominated and sent to them." * The importance and power of the commons appear even by the arbitrary measures which the queen thought it necessary to pursue, upon certain occasions, in order to bend the house to her wishes. From the statement of Mr. Hume, we might be led to believe, that Elizabeth exercised the undisputed power of imprisoning such members as she pleased, and that she esteemed this as one of her undoubted *prerogatives;* but though in several cases she certainly did commit members who had offended her to the Tower, yet that the commons never acknowledged the existence of such a prerogative in the crown, most fully appears from a debate which took place in the thirteenth year of the reign. Mr. Strickland, a member of the house, having made some free remarks touching the reformation of the book of common prayer, was called before the council, and commanded to forbear going to the house, till their pleasure was further known. Upon this an animated debate ensued, and principles were asserted totally at variance with those which Mr. Hume has called, "the established principles of the times, which attributed to the prince such an unlimited and indefeasible power, as was supposed to be the origin of all law, and could be founded and circumscribed by none." Mr. Yelverton said, "that it was fit for

* Clarend. St. Papers, vol. i. p. 92.

princes to have their prerogative, but yet the same *to be straitened within reasonable limits.* The prince, he shewed, could not of herself make laws, neither might she by the same reason break laws." *

R. E.

This is certainly rather at variance with the historian's assertion, that "the crown possessed the full legislative power;" but what became of Mr. Strickland?

SIR R. E.

The energy of the house in supporting their privileges made a due impression, and on the day after the debate, the sequestered member again made his appearance, "by the council's allowance, to the no small joy of his brethren." † A few years afterwards, a similar circumstance occurred.‡ Mr. Wentworth, the member for Tregony, indignant at the unconstitutional measures pursued by the court in prohibiting the house from discussing certain matters of state, resolved to vindicate the privileges of the commons, and accordingly addressed the house in a speech of extraordinary eloquence and boldness: never were noble sentiments clothed in more ardent language; for though strongly tinctured with the quaintness of the age, there is a fiery soul in this speech which rouses one's feelings like the tones of martial music. Mr.

* Parl. Hist. vol. iv. p. 149. † Id. p. 153.
‡ D'Ewes's Journal, p. 236.

Wentworth thus commences: "Mr. Speaker. I find written in a little volume, these words in effect; '*Sweet is the name of liberty, but the thing itself, a value beyond all inestimable treasure.*' So much the more it behoveth us to take care, lest we, contenting ourselves with the sweetness of the name, lose and forego the thing, being of the greatest value that can come unto this noble realm. *The inestimable treasure is the use of it in this house.*" The speaker then proceeds to comment upon the infringement of the prerogative of free speech, and in the course of his observations, takes occasion to enlarge upon the nature of the royal office and character.

"If we follow not the prince's mind, Solomon saith, *the king's displeasure is a messenger of death.* This is a terrible thing to weak nature, for who is able to abide the fierce countenance of his prince? But if we will discharge our consciences, and be true to God, and prince, and state, we must have due consideration of the place and occasion of our coming together, and especially have regard unto the matter, wherein we both shall serve God, and our prince and state faithfully, and not dissembling as eye-pleasers, and so justly avoid all displeasures, both to God and our prince. For Solomon saith, *in the way of the righteous there is life;* as for any other way, it is the path to death. So that, to avoid everlasting death and condemnation with the high and mighty God, we ought to proceed in every

cause according to the matter, and not according to the prince's mind. * * * The queen's majesty is the head of the law, and must of necessity maintain the law, for by the law her majesty is made justly our queen, and by it she is most chiefly maintained. Hereunto agree the most excellent words of Bracton. *The king hath no peer nor equal in his kingdom.* He hath no equal, for otherwise he might lose his authority of commanding; since that an equal hath no power of commandment over an equal. *The king ought not to be under man, but under God, and under the law, because the law maketh him a king. Let the king therefore attribute that to the law which the law attributeth to him, that is, dominion and power; for he is not a king in whom will and not the law doth rule, and therefore he ought to be under the law.*"

The tenor of this speech was so bold, and esteemed so disrespectful to the queen, that Wentworth was not suffered to conclude it, but after an examination before such members of the privy council as were members of the house and others, was committed to the Tower, whence, after an imprisonment of some weeks, he was liberated at the suggestion of the queen. It appears from the examination of Wentworth before the council, that he was committed for using certain expressions personally disrespectful to her majesty, and not for broaching doctrines which were conceived to be unconstitutional. Thus he is asked, "how durst

you say that the queen's majesty had unkindly abused herself against the nobility and the people?" but he was not asked how he dared to state, that the law was superior to the king. Even Sir Walter Mildmay, the chancellor of the exchequer, in his speech on the subject of Wentworth's enlargement, recognises the right of freedom of speech, "which hath always been used in this great council of parliament, and is a thing most necessary to be preserved." On the other hand, it cannot be denied, that expressions were frequently made use of in parliament, highly hostile to the spirit of freedom. You will find these passages carefully collected by Mr. Hume. They certainly prove that the court possessed adherents in the house, who were willing to go all lengths in supporting its arbitrary pretensions; but I cannot consent, with Mr. Hume, to take these slavish doctrines for constitutional maxims, or as the principles of the age.

R. E.

Do you think that such principles as those avowed by the member for Tregony were current without the walls of parliament?

SIR R. E.

Mr. Hume would persuade us that they were not, but that the established principles of the times all led to the recognition of a despotic authority in the sovereign. Mr. Brodie, however, has cited several writers to shew, that the sentiments of the

age regarding the constitution were by no means of that character. Let us read the observations of Aylmer (who afterwards became Bishop of London) on this subject: "" The regiment of England is not a mere monarchy, as some for lack of consideration think, nor a mere oligarchy, nor democraty, but a rule mixed of all those, wherein each one of these have or should have like authority. The image whereof, and not the image, but the thing in deed, is to be seen in the parliament house, wherein you shall find these three estates. The king or queen which representeth the monarchy; the noblemen, which be the aristocraty, and the burgesses or knights the democraty. * * * In like manner if the parliament use their previleges, the king can ordain nothing without them. If he do, it is his fault in usurping it, and their folly in permitting it; wherefore, in my judgment, those that in King Henry VIII.'s days would not grant him that his proclamations should have the force of a statute, were good fathers of the country, and worthy commendation in defending their liberty. * * * If the regiment were such as all hanged upon the king's or queen's will, and not upon the laws written; if she might decree and make laws alone without her senate; if she judged offences according to her wisdom, and not by limitation of statutes and laws; if she might dispose alone of war and peace; if, to be short, she were a mere monarch, and not a mixed ruler, you might, per-

adventure, make me fear the matter the more." What a very different picture does this present of the English government, from that which has been drawn by the pencil of our celebrated historian!

Having now reviewed the principal transactions of this reign, so far as they relate to its constitutional history, let us consider the justice of the character which Mr. Hume has bestowed upon it. We have seen that many arbitrary measures were pursued by Elizabeth — measures decidedly at variance with the well-being of a free state. The existence of the courts of star-chamber, and of the high commission; the power of imprisonment exerted by the court; the high and really unfounded notions of prerogative which prevailed there, and the tone of language held by the queen to the commons, were all, without doubt, highly dangerous to the interests of liberty. But shall we therefore conclude, with the historian, that liberty was extinct, and that our ancestors, at this period, enjoyed no better form of government than their neighbours on the Continent? I trust you see the distinction. In a purely arbitrary government, where the acknowledged principle is *quod principi placet legis habet vigorem*, the people have no test whatever whereby to try the actions of their rulers, except the vague notions of natural justice, which, in the last extremity of their outraged feelings, will sometimes impel them to resist and destroy the power that oppresses them. But under a limited

form of government, where the boundaries of the regal authority are defined, the people possess an easy, an intelligible standard, by which to measure any incursions on the part of their governors upon their freedom and privileges. When their liberties are thus attacked, they may appeal to that higher power to which, as they are taught, the crown itself owes allegiance — the law: and should the fountains of justice be corrupted by court influence, they may appeal to the ultimate tribunal of public opinion, which, in the last resort, will invariably be exerted with success. Under a despotic form of government, public opinion cannot operate in this manner, for it is crude and unformed; but under a limited authority, the judgment of every man is exercised and matured on the subject. Of this truth we have had an exemplification even in Henry the Eighth's time: — when Wolsey attempted to impose a tax without assent of parliament, he was defeated by the mere expression of public opinion: "the poor cursed," and "the rich repugned;" "for they said, that if men should give their goods by a commission, then were it worse than the taxes of France, and so England would be bond and not free." * So in the time of Elizabeth, the people knew and felt that they lived under a government subject *by law to the law*; and that, whatever might be the extravagances of the prerogative, their liberties were secured to

* Ante, p. 94.

them by an authority to which every one might appeal. Even that very power of appeal, whatever might be the event, — the power of bringing to issue before the public, within the walls of parliament, or before the tribunals of justice, the disputes between the crown and the subject, has ever distinguished the government of this country from a despotism, under which such a power could not, for a moment, be suffered to exist. Repeatedly, as we have seen, during the reign of Elizabeth, the house of commons discussed and maintained their privileges, as existing independently of the will of the crown, and inherent in them, by the constitution, for the benefit of themselves and their fellow-subjects. Would this have been suffered under a despotic monarchy? In fact, during the reign of Elizabeth, the cause of the people was making a gradual but sure progress, by the increasing wealth and intelligence of the middle classes, and by the consequent power which they were acquiring. That power was, doubtless, felt by Elizabeth, who had the discretion and good sense to obtain and preserve the affections of her people. So strong, indeed, was the attachment to her person and government, that some of her acts, decidedly hostile to the spirit of the constitution, were suffered to pass without question; and upon insulated facts like these, without reference to the circumstances in which the country was placed, and to the genera

tone of public feeling at the period, Mr. Hume has framed a theory altogether at variance with historical fact. The history of the two succeeding reigns, which we are now approaching, is, in itself, a complete refutation of this theory; for, had the government of England, in the time of Elizabeth, been what it is represented in the pages of Mr. Hume, the conduct of the parliament under James I. and his son must have exhibited a character altogether different.

CONVERSATION VI.

HISTORICAL SKETCH. — JAMES I.

JAMES I. — Important era. — His notions of the English government and laws. — His proclamation for regulating elections. — His style of address to parliament. — Illegal proclamations. — Opinions of the judges upon them. — The great case of impositions. — Other grievances. — Benevolences. — Ecclesiastical courts favoured by the king. — Proceedings of the Court of High Commission. — Prohibitions. — Archbishop Bancroft and Sir Edward Coke. — Monopolies. — Mompesson. — Meeting of parliament in 1614. — Complaints of grievances. — King's displeasure. — Protestation of the commons. — Torn from the journals by the king. — Parliament dissolved. — Members imprisoned. — Benevolence. — Progress of the Constitution. — The demands of the commons. — Encroachments, or not, upon the prerogative.

SIR R. E.

A SINGULAR and important period of our history is now before us, upon which I must beg you to bestow your best attention — the reign of James I., in which the great contest between the country and the king, which terminated so fatally in the course of the next reign, may be said to have first broken out.

On his accession to the throne of England, James appears to have been eminently ignorant of the powers and duties appertaining to his freshly acquired dignity. With the municipal laws of his new kingdom he was professedly unacquainted, and he does not appear to have possessed any greater degree of information on the subject of her constitution.

R. E.

The fact, that on his journey to London he ordered a thief to be executed without the usual little preliminary of a trial *, is certainly a sufficient proof that your first assertion is accurate.

H. E.

If you would give me time, I think I could find you several instances, in his conferences and disputes with the common lawyers, in which James acknowledges his ignorance of their craft.

SIR R. E.

We will not tax your memory at present, but proceed to examine his majesty's notions on constitutional subjects. One of his first measures † was to issue a proclamation regulating elections, and forbidding the choosing of knights and burgesses, bankrupt or outlawed, and commanding such persons only to be chosen as were taxed

* Stow, p. 821.

† 11 Jan. 1603, Book of Proclamations, p. 57. Petition of grievances, 2 How. St. Tr. 526.

to subsidies, and had paid and satisfied the same. Even in the reign of Elizabeth, the commons had repelled a similar encroachment upon their privileges*, and it was not to be expected that they should tamely suffer so serious an injury at the hand of James. After a spirited resistance on the part of the commons, which ill accorded with James's declaration, "that they derived all matters of privilege from him, and by his grant," the particular case in which the authority of the royal proclamation had been questioned was compromised. This opposition to his pretensions does not, however, appear to have damped the ardour of James to maintain the absoluteness of his kingly supremacy. He still continued to issue his proclamations, denouncing pains and penalties on the commission of acts not forbidden by law; and his language to his parliament was still in the lofty strain of an absolute monarch. The commons, during an inquiry into grievances in the year 1610, were summoned to Whitehall, where his majesty addressed them in the following remarkable words: — "He did not intend to govern by the absolute power of a king, though he well knew that the power of kings was like the divine power; for, as God can create and destroy, make and unmake at his pleasure, so kings can give life and death, judge all, and be judged by none: they can exalt and abase, and, like men at

* D'Ewes's Journal, p. 393. 517.

chess, make a pawn take a bishop, or a knight. But that all kings who are not tyrants or perjured will bind themselves within the limits of their laws; and that those who persuade them to the contrary are vipers and pests, both against them and the Commonwealth. Yet as it is blasphemy to dispute what God might do, so it was sedition in subjects to dispute what a king might do in the height of his power." Such being the notions of the regal authority which James had imbibed, it is not wonderful that he should attempt to impose various arbitrary measures upon the country. The spirit of the commons was not, however, so tame as to submit to these assumptions without question; and the zeal which they displayed in the protection of their liberties soon brought to issue the legality of some of James's proceedings. We have seen, that on his first arrival in England, he issued a proclamation, manifestly illegal, and from that period he had continued to promulgate various edicts of the same kind, the lawfulness of which was equally questionable. The house of commons, incensed at this assumption of legislative power, at length resolved to present a petition of grievances to the king; and in the enumeration of their complaints, the number of illegal proclamations which James had issued forms a conspicuous feature. To give you some idea of the powers which his majesty took upon himself to exercise by these

instruments, it will be sufficient to instance the proclamation against building in London, by which James directed that all houses erected contrary to the proclamation should be pulled down by the sheriff or aldermen, that the materials should be sold for the benefit of the poor, and the workmen be committed to prison.* The commons might, therefore, well entreat his majesty, "as the great and sovereign physician of the state, to apply such a remedy, as that this disease might be presently cured." James, who could scarcely believe that, "in the height of his power," he had not even authority to prevent his subjects from building on their own land, thought fit, upon this remonstrance of his faithful commons, to consult the judges upon the legality of his proclamations; and the answer which he received from them at once put the question to rest. The sages of the law were summoned before the council, and, in order to insure an impartial opinion from them, they were told by the counsellors present, "that it was necessary, at that time, to confirm the king's prerogative with their opinions, although there were not any former precedent or authority in law." Notwithstanding this strong charge, the proclamations in question were pronounced illegal, and it was resolved by the judges, "that the king, by his proclamation, cannot create any offence, which was not an offence before; for then

* Book of Proclamations, p. 159.

he may alter the laws of the land, by his proclamation, in a high point: — that the king hath no prerogative but that which the law of the land allows him; but that he may, by his proclamation, admonish his subjects that they keep the laws, and do not offend them, upon punishment, to be inflicted by the law." *

R. E.

And yet, this is the reign in which, according to Hume, the issuing of proclamations during the recess of parliament, with the effect of laws "was established by uniform and *undisputed* practice, and was even acknowledged by lawyers, who made however this difference between laws and proclamation, that the authority of the former was perpetual, while that of the latter expired with the sovereign who emitted them." How strangely must he have perverted the truth, or how imperfectly must he have been acquainted with it!

SIR R. E.

You must observe, that Hume confines his observation to proclamations, "to restrain and prevent such probable *mischiefs* and *inconveniences*, as the king saw growing on the state, against which no certain law was extant;" but even thus limited, the observation is certainly very incorrect. Let us now pass to some of the other complaints in the petition of grievances, in the front of which,

* Coke's Rep. part xii. p. 74.

we find the article of "new impositions." These were certain duties upon the importation and exportation of merchandize, imposed at the ports, by virtue of the royal authority only. The arguments to which the discussion of the king's right gave rise, are so very numerous, that I cannot pretend to offer you even an abstract of them, but I will trace, as shortly as possible, the grounds upon which I believe this exertion of the prerogative to have been unconstitutional. "It is," says Sir Matthew Hale, "a thing most certain and unquestionable, by the law of England, that no common aid, or tax, can be imposed upon the subject, without the consent of parliament, and no dispensation, or *non obstante*, can avail to make it good or effectual; no, not for the maintaining of a military force, though in case of necessity." * The authority of Hale, who had devoted himself with a most singular assiduity to this great subject of prerogative taxation, might alone be sufficient to dispel every doubt; but the question rests upon a much better foundation than the opinion of any man, however learned. Taxation, unless by the assent of the people (which assent amongst us is always signified by our representatives in parliament), can only exist under a despotic or unsettled form of government, and is totally abhorrent to the genius of our free constitution. It is an engine of power, so vast and weighty, that when lodged in the hands

* 2 State Trials, p. 379.

of one man, the liberties of the nation must almost necessarily be at his disposal. Had James been able to establish this as an uncontested right, it cannot be doubted, that parliament would have ceased to exist, even in his time, or must, at all events, have been totally abolished under the government of his son or his grandson. With regard to the question of *precedent* and authority, upon which the conduct of James, in this instance, has been defended by Mr. Hume, almost as little doubt exists, as upon the principle of the measure. You cannot have forgotten the various instances in which this great principle was, as we have seen, asserted, both by direct statute, and in case of its violation, by the earnest complaints of the commons. "The Statute Book," says a learned constitutional lawyer *, "was full of legislative declarations against taxes, without consent of parliament, and these declarations reached back as far almost as there is any testimony from parliamentary records, though not so much as one clear recognition of the claim could be found in the records of justice." It is true, that the conduct of James was sanctioned by the judgment of the court of exchequer †, as was that of his son, in the collection of ship-money, by the opinion of ten out of the twelve judges; but this, unfortunately, is only one more instance of that judicial profligacy which

* See Mr. Hargrave's Observations, Pref. to Law Tracts, p. xvi.
† Bates's case, Lane's Rep. p. 22.

our courts of justice so frequently displayed during the reign of the Stuarts. There is but too much reason to believe, that arguments similar to those urged upon Sir Edward Coke in the matter of proclamations, were employed by the court to procure a favourable decision from the judges in this case; but, under any circumstances, the attempt made by James was most dangerous to the well being of the state, and proved him to be either very ignorant of the principles of the constitution, or extremely willing to pervert them. Should you, at any future period, be desirous of studying this great question more accurately, you will find all the requisite information in Hale's admirable tract *, "concerning the custom of goods imported and exported," and in the "great case of impositions." †

R. E.

What became of the question?

SIR R. E.

The house of commons remonstrated against the illegality of these impositions, but no legislative declaration to that effect was made, until the succeeding reign, to which I shall call your attention hereafter. Before I proceed to notice the other grievances, exhibited by the commons, it will be proper to advert to another attempt made

* Hargrave's Law Tracts.

† Howell's State Trials, vol. ii.; consult also Brodie's Hist. vol. i. p. 266.

by James to raise money against law; — a kind of appendix to the case of impositions. In order to avoid the necessity of applying to parliament for supplies, which they were not always willing to grant, his majesty resolved to resort to a mode of raising money which had been practised, though very unsuccessfully, as we have seen, by some of his predecessors, and which had been declared illegal by a statute passed in the reign of Richard III. The project of a benevolence, or nominal free gift to the crown, was set on foot, in the prosecution of which, as might well be expected, much oppression occurred; and persons who refused to contribute fell under the displeasure of the court, which seldom failed to make itself felt. Upon two several occasions, in the twelfth and nineteenth years of his reign *, did James resort to this illegal expedient. In the suceeding reign the repetition of it was prohibited by statute. †

To uphold and maintain the court in practices so obnoxious and illegal as these, every engine which could afford assistance was eagerly put in requisition. The king possessed no troops, no standing army, with which to enforce obedience to his wishes; and it therefore became necessary to render the courts of justice as much as possible the instruments of his will, so as to impose upon his subjects

* 12 Coke's Rep. p. 120. note.

† For a fuller account of benevolences, see Brodie's Hist. vol. i. 253., and Coke's Rep. *ubi sup.*

by fraud the measures which he was unable to establish by force. We have seen with what little success his majesty tampered with Sir Edward Coke and the other judges in the case of the proclamations; and this circumstance, together with a notion which James entertained that the civil law and its professors were more favourably disposed towards his prerogative than the common lawyers, induced him to view the ecclesiastical courts with greater regard than the tribunals of the common-law. Elated, no doubt, by a consciousness of deserving the royal approbation, the spiritual courts had, upon various occasions, overstepped the boundaries of their jurisdictions, and many disputes had consequently occurred between the ecclesiastical tribunals and those of Westminster hall. The civilians complained of the prohibitions which had been issued to restrain their proceedings; and on the other hand the commons asserted amongst their grievances, that the free granting of those writs had been improperly obstructed. From the various cases which occurred I shall select the more prominent one of the ecclesiastical commission, which shows in a tolerably clear light the object of the court in supporting these spiritual jurisdictions. By the statute 1 Eliz. c. 1. power was given to the crown to erect a court of high commissioners for the decision of ecclesiastical matters, but the act conferred no authority upon the commissioners to

punish by fine and imprisonment. We have seen that the limits of this jurisdiction were but too carelessly observed in the reign of Elizabeth, and under the government of James the evil appears to have increased. Matters cognizable only by the temporal courts, were determined by the high commissioners, who did not scruple to enforce their decrees in the most oppressive and vexatious manner. * So flagrantly illegal were their proceedings, that Sir Edward Coke, whose name had been inserted in the commission, refused to sit under it unless it were remodelled. The judges who presided in this court were chiefly churchmen, whom James had always found willing to concur in his views, and the boundaries of the jurisdiction being in practice so ill defined, rendered it a fit instrument for enforcing any arbitrary designs. You may judge how well disposed the clergy were to extend their own jurisdiction and the king's power, from the fact that on a complaint of the number of prohibitions issued to this court, Bancroft, the archbishop of Canterbury, informed the king that he, in his own person, had the power of deciding the boundaries of the ecclesiastical jurisdiction. "It was much marvelled," says Sir Edward Coke, "that the archbishop durst inform the king that such absolute power and authority belonged to him." † The

* Howell's State Trials, vol. ii. p. 522.
† 12 Coke's Rep. p. 64.

commons' complaint of this grievance procured them no redress, and the court of high commission survived to be accounted one of the most enormous abuses of the succeeding reign.

H. E.

Was it not upon the occasion you have just mentioned, that Sir Edward Coke cited to the king that excellent passage from Bracton, which I remember was in the speech of that brave Cornish man you read to us yesterday?

SIR R. E.

It was. Coke told his majesty that the law protected him in safety and peace. "With which," says Coke, "the king was greatly offended, and said, 'that then he should be under the laws, which was treason to affirm,' as he said; to which I said that Bracton saith, *Quod rex non debet esse sub homine, sed sub Deo et lege.*" There is another account of this transaction preserved by Lodge *, in a letter to the Earl of Shrewsbury, "I heard," says the writer, "that the Lord Coke, amongst other offensive speech, should say to his majesty, that his highness was defended by his laws, at which saying, with other speech then used by the Lord Coke, his majesty was very much offended, and told him that he spake foolishly, and said that he was not defended by his laws, but by God, and so gave the Lord Coke in other

* Illustrations, vol. iii. p. 364.

words a very sharp reprehension, both for that and other things; and withal told him that Sir Thomas Crompton (the judge of the admiralty court) was as good a man as Coke."

R. E.

I should imagine that James was little pleased with the complaints of his faithful commons.

SIR R. E.

Sir Francis Bacon, indeed, on presenting a petition of grievances to his majesty, assured him that "it was but *gemitus columbæ*, the mourning of a dove." Sir Francis might have found a more correct simile in the cry of the eagle, and, in truth, the royal ears listened to the sound with small pleasure. Not long afterwards the parliament was dissolved, and for several years, with the exception of a few months, during which the parliament again sate, the king continued to govern without the assistance of his national council.

H. E.

But where did he find money in the meanwhile, for James was certainly not a prince who could subsist upon a small revenue?

SIR R. E.

One of the principal sources from which he supplied his treasury, or rather the treasuries of his courtiers during this period, was the grant of

monopolies. The granting of monopolies had been an intolerable grievance to the subject in the reign of Elizabeth, and James, soon after his accession, adopted the popular measure of issuing a proclamation against them. As he grew poorer, however, he resorted himself to the proceedings he had formerly condemned; and the grant of illegal patents and monopolies of every kind, became a source of the most serious complaint. You must, both of you, remember the case of Sir Giles Mompesson (the original, it has been said, of Massinger's Sir Giles Overreach), and I need not, therefore, detail the enormous grievances which were induced by this system. I shall, however, just advert to the patent for "Inns and Hostelries," of which Sir Giles was the projector, in order to show the intolerable vexations to which the monopolists gave rise. According to Sir Edward Coke's report of this matter, Mompesson "sued by a writ of *quo warranto* those who had old inns and refused to compound; and outlawed *divers hundreds* before they had notice of it; and there were *three thousand one hundred and twenty innkeepers* served with process of *quo warranto* by Sir Giles Mompesson; and of these above five hundred put in their plea, and not above *two* of all these ever came to issue." * Had the commons remained silent under these manifold grievances,

* Proceedings of the Commons in 1620, vol. i. p. 103; and see Howell's State Trials, vol. ii. p. 1119.

the government of the country would speedily have assumed a character decidedly arbitrary; but, fortunately, a better spirit prevailed in that assembly. On the calling of a new parliament, in 1614, the imposition of customs by the king, and other grievances, were the first objects to which the attention of the house of commons was turned; and so little did the court relish these popular measures, that a dissolution almost immediately followed them. Nor did the third and last parliament of James's reign, which was convened in the year 1620, show any greater readiness to subscribe to the arbitrary doctrines of the court. They, indeed, waived an inquiry into the imprisonment of Sir E. Sandys, who, as it was strongly suspected, had been thus punished for the popular part which he had acted in the parliament of 1614; but the debates upon this subject gave rise to a spirited altercation between the king and his parliament, which terminated in an angry dissolution. The transaction in question exhibits so well the state of public feeling, at this important period, that I shall explain it at somewhat greater length than is my custom. On the 21st of December, 1621, the commons addressed James, and humbly represented what they conceived to be the causes of the "great and growing mischiefs with which the country was afflicted." Amongst these causes, the increase of the Catholic faith, the power of Spain, and the Spanish match,

are enumerated as the chief. These were matters which, in the estimation of the sovereign, peculiarly belonged to his own province of king-craft; and in his reply, therefore, he reprehended, in language of much acerbity, so bold an attack upon his prerogative royal. At the same time, by way of retaliation, one might suppose, for this alleged infringement of *his* rights, he thought fit to impugn the privilege, claimed by the commons, of holding their members amenable to the house only for any misdemeanors committed in that house. "Whereas, we hear," says his majesty, "that they have sent a message to Sir Edwin Sandys to know the reason of his late restraint, you shall, in our name, resolve them that it was not for any misdemeanor of his in parliament. But to put them out of doubt of any question of that nature that may arise among them hereafter, you shall resolve them, in our name, that we think ourself very free and able to punish any man's misdemeanors in parliament, as well during their sitting as after, which we mean not to spare hereafter upon occasion of any man's *insolent behaviour* there, that shall be ministered unto us." * Upon the receipt of this hostile communication, the house wisely determined to defer all discussion, as to the "soul killing letter," until the ensuing day. At that time, accordingly, the house met, with a visible desire to vindicate their privileges from

* Proceedings of the Commons in 1621, vol. ii. p. 277.

this serious attack. Some strong expressions were made use of: Mr. Delbridge said, that, "as for the privileges of the house, touching the petition to the king, he had as willingly hang over the gallows, as fry over a faggot;" and Sir Francis Seymour added, "if we do now, out of fear, forego our privileges, we are unworthy of our liberties."* A committee being appointed to frame an answer to the royal message, the following was one of the clauses of this "apologetic petition:" "And whereas your majesty's letter doth seem to abridge us of the ancient liberty of parliament for freedom of speech, jurisdiction, and just censure of the house, and other proceedings there, wherein (we trust in God) we shall never transgress the bounds of loyal and dutiful subjects; a liberty which we assure ourselves, so wise and so just a king will not infringe, (*the same being our undoubted right and inheritance, received from our ancestors,* and without which we cannot freely debate, nor clearly discern of things in question before us, nor truly inform your majesty) wherein we have been confirmed by your majesty's former gracious speeches and messages; we are, therefore, now again enforced humbly to beseech your majesty,"† &c. Upon this spirited vindication, the king, in his rejoinder, remarks, with great simplicity, "Although we cannot allow of the style, calling it *your ancient and undoubted right and inheritance;* but

* Proceedings of the Commons in 1621, vol. ii. p. 280, 281.
† Ibid. p. 293.

would rather have wished that ye had said, that your privileges were derived from the grace and permission of our ancestors, and us, (for most of them grow from precedents, which show rather a toleration than inheritance,) yet we are pleased to give our royal assurance, that, as long as you shall continue to contain yourselves," &c. * These expressions were not calculated to allay the suspicions of the commons. In the debate which ensued, Mr. Christopher Brooke said, "we have our liberties and privileges by prescription, time out of mind, and not by toleration. He would have a protestation entered in the house, that we claim our privileges as an inheritance, and not as granted from the king to us." Several other members spoke to the same effect, and even the courtiers did not venture to support his majesty's notions of the constitution. Mr. Solicitor said, "that our liberties and privileges *are* our inheritance; but he would not have us stand so much on the manner as the matter of the king's answer;" and he concluded that "the devil or his instruments had sown this division." Mr. Secretary's excuse for his master was, that "it was only the slip of a pen in the end of a long answer." The tone of the house was, in short, such, that James himself thought fit, in a letter to Mr. Secretary Calvert, to explain the obnoxious letter which he had transmitted. "The plain truth is," said his

* Proceedings of the Commons in 1621, vol. ii. p. 327.

majesty, "that we cannot, with patience, endure our subjects to use such antimonarchical words to us concerning their liberties, except they had subjoined that they were granted to them by the grace and favour of our predecessors. But as for our intention herein, God knows, we never meant to deny them any lawful privileges," &c. * The commons were by no means satisfied with this explanation; and soon afterwards the celebrated protestation, which follows, was entered upon the Journals of the house.

"That the liberties, franchises, privileges, and jurisdictions of parliament, are the ancient, and undoubted birth right, and inheritance of the subjects of England, and that the arduous and urgent affairs concerning the king's state, and defence of the realm, and of the church of England, and the making and maintenance of laws, and redress of mischiefs and grievances, which daily happen within this realm, are proper subjects, and matter of counsel and debate in parliament, and that in the handling and proceeding of those businesses, every member of the house hath, and of right ought to have freedom of speech to propound, treat, reason, and bring to conclusion the same. That the commons in parliament have like liberty and freedom to treat of those matters, in such order as in their judgments shall seem fittest, and that every such

* Proceedings of the Commons in 1621, vol. ii. p. 340.

member of the said house hath like freedom from all impeachment, imprisonment, and molestation, (other than by the censure of the house itself) for or concerning any bill, speaking, reasoning, or declaring of any matter or matters touching the parliament or parliament business; and that if any of the said members be complained of, and questioned for any thing said or done in parliament, the same is to be showed to the king, by the advice and assent of all the commons assembled in parliament, before the king give credence to any private information." *

The indignation of the king, on finding the offence of the commons repeated in this solemn manner, was so greatly roused, that, sending for the journal, he tore out this noble protestation with his own hand, and directed the following memorandum to be entered in the council book. "His majesty did, in full assembly of his council, and in the presence of all the judges, declare the said protestation to be invalid, annulled, and of no effect."

R. E.

How odious and arbitrary a measure!

SIR R. E.

Yes; had I been a member of that parliament, I should both have felt and spoken most strongly on the subject; but James was too well aware of

* Proceedings of the Commons in 1621, vol. ii. p. 360. Hatsell's Precedents, vol. i. p. 79.

the temper of his commons, to suffer them to debate upon the bold measure he had adopted, and immediately dissolved the parliament. The members returned to their homes indignant and discontented, and the king published a declaration in defence of his proceedings. *

R. E.

How madly bent upon his own ruin must James have been, thus to quarrel with his parliament, defenceless as he was, without money, and without troops.

SIR R. E.

His royal character was in his own eyes his sufficient guard, and timid as he was, he did not hesitate to follow up the blow he had struck with measures equally strong. The "ill-tempered spirits," Sir Edward Coke and Sir Robert Phillips, were committed to the tower; while Selden, Pym, and Mallory, were sent to other prisons, and orders were given to seize the papers of Sir Edward Coke, and to seal up the locks and doors of his chamber in the temple. Sir Dudley Digges, Sir Thomas Crew, Sir Nathaniel Rich, and Sir James Perrot, who had greatly distinguished themselves in the late debates, were despatched into Ireland by way of punishment. † The effects of these proceedings were manifest in the discontent of the

* Appendix to the Debates of 1621.
† Rushworth's Collections, vol. i. p. 55.

nation at large, and letters from the council were despatched to the judges on their circuits, taking notice of licentious and undutiful speeches touching state and government, notwithstanding several proclamations prohibiting the same; which the king was resolved no longer to let pass without the severest punishment. *

Nor did the measures adopted in order to raise supplies for assisting the palatine, however grateful to the people the cause of that unfortunate prince was, tend to soften the popular discontents. The parliament having been dissolved without giving the necessary funds, James resolved to raise them by a benevolence, and letters from the council were accordingly issued to the judges on their circuits, commanding them to assist in the collection of this "voluntary contribution," and to certify to the council-board the names of all who, "out of obstinacy or dissaffection, refused to contribute therein according to their estates and means." † Nor was this certificate of the defaulter merely an empty threat. One Barnes, a citizen of London, having refused to make this "voluntary contribution," was directed to prepare himself to carry by post a despatch into Ireland, and was glad to buy his peace by subscribing 100*l.* You will not fail to remark the policy of the court in making the judges the instruments of this illegal exaction; it not only gave a sanction to the measure

* Rushworth's Collections, vol. i. p. 55. † Ibid, p. 61.

in the eyes of the public, but by rendering the ministers of justice parties to the transaction, diminished the chance of a decision against the court, in case the legality of the benevolence should be questioned.

Such is the heavy catalogue of the unconstitutional measures pursued during the reign of James I., notwithstanding which, it cannot be doubted, that the cause of liberty made a rapid progress.

R. E.

And yet no new securities were added for the protection of popular rights.

SIR R. E.

It is true — but the great reforms of succeeding times sprung from the spirit which manifested itself in this reign. Wealth and knowledge began to diffuse themselves, and with them came their inseparable companion, a desire of rational freedom, of securing the benefits which prosperity and intelligence confer. Throughout the whole of this reign the commons displayed a determined resolution to support their own privileges, and to repress the enormous prerogatives which the king claimed to exercise; and though they did not succeed in limiting the royal powers by express enactments, yet they prepared the nation at a future day to demand those salutary limitations

which have clearly marked the limits of the prerogative.

H. E.

Do you then think that the enactments you have alluded to were encroachments upon the royal authority, which I imagine is the impression which Hume wishes to give?

SIR R. E.

Your question will take a little time in the answering. But, before I proceed to my reply, let me remark that the subject is not, in principle, of that importance, which the angry controversies to which it has given rise, would lead us to attribute to it. Mr. Hume, having by some strange accidents of birth or education, contracted an affection for the family of the Stuarts, has laboured to prove that they have been unjustly blamed for the arbitrary part that they acted; that they governed only according to the maxims of their predecessors; and that their guilt merely consisted in the attempt to preserve those prerogatives, with which, according to the course of precedent and the authority of history, they were invested. He admits, in effect, that the existence of many of those prerogatives was utterly incompatible with a free and enlightened system of government, and that the changes which were introduced into the constitution were called for by the improved state of society, and the exigencies consequent upon such

improvement. On the other hand, the opponents of the historian affirm, that in the attempt to stretch his prerogative, James I. acted in direct opposition to the old and established maxims of the constitution, and that the commons in resisting the measures of the court, made no claim to novel rights and privileges not recognized by law, — no encroachment upon the acknowledged and constitutional powers of the crown. Now it certainly appears to me, that this dispute entirely resolves itself into a controversy upon the personal merits of the sovereign; whether or not he conceived himself to be justified in the course which he pursued. Let us grant Mr. Hume's position; let us suppose that James was supported in all his measures by undoubted precedents; that it was usual for his predecessors to levy money without the assent of Parliament, by imposing customs at the ports, and by forced loans and benevolences; that proclamations were reputed even by the lawyers to have the force of laws; that the king was accustomed to imprison such members of the commons as displeased him, and that it was the current doctrine, that the parliament only derived its privileges by the grant and concession of the crown; let us suppose all this, and to what will it lead? It will only prove, at all events, that the theory of our constitution at that period was a very imperfect one, and that the changes which took place were loudly called for; it will only prove that the com-

mons acted a wise and commendable part in venturing to insist upon alterations which the changes in the state of society had rendered necessary; it will only prove that James had the obstinacy to adhere to an old and bad system, in opposition to the wishes and necessities of his people. It furnishes him indeed with all the excuses which precedents can supply, and so far may be held to be an apology for his follies. But I hope that I have sufficiently shown, even in the brief sketch of our constitution which I have attempted to give, that the historian is not correct in representing James to have been borne out, in his arbitrary assumptions, by the authority and precedents of former times. Upon each and every of the disputed questions with regard to the prerogative, I would willingly join issue with Mr. Hume, under the fullest conviction that the weight of evidence would preponderate in my favour. I do not mean to assert, that many authorities may not be adduced in favour of James's pretensions; that the historian may not be able to show by the best evidence, that one or more of our monarchs have made the same attempts; but I will maintain, that the presumption which arises from those instances of misgovernment is completely rebutted, either by the retractation of those who were guilty of them, by the protestation of the commons, or by express legislative denunciations against their repetition.

There is also another way of viewing the ques-

tion. Granting all Mr. Hume's positions, and at the same time remembering his concession, that the arbitrary measures pursued by James and his predecessors were incompatible with the gradual improvement of society, and the growing importance of the commons, it yet appears to me that the principles and conduct of James I. may fairly be termed unconstitutional. If originally the government was not wholly monarchical in its form and spirit, but admitted a certain degree of popular influence (which surely cannot be denied), that influence must necessarily have varied in proportion to the situation and power of the body from which it was derived. Now let us consider for a moment the station which the commons filled in the reign of Henry III. The bulk of the people were involved in comparative ignorance and indigence, numbers being held even in a state of absolute servitude. The little intelligence which was spread amongst them was confined to the inhabitants of the towns, who in that infancy of our commerce constituted only a small portion of the community. Power, wealth, learning, and accomplishments were the privileged property of the nobles, or of the churchmen. Under circumstances like these, the influence of the commons was necessarily small; but, small as it was, its weight was duly acknowledged by the constitution. When, on the invention of printing and the revival of letters, knowledge began to spread itself amongst all

classes of society, when commerce and manufactures began to confer that importance which wealth always procures for its possessors, the commons of England naturally assumed a very new and different position. A great proportion of the power and riches formerly engrossed by the aristocracy and the church changed hands. A mean and inconsiderable, because ignorant and indigent, portion of society, now became powerful and important. In what light, then, did the constitution view them? Did it still regard them as an inconsiderable body, entitled only to that share of power in the government which their predecessors three centuries earlier enjoyed? Did it not rather, wisely recognizing their superior intelligence and ability, confer upon them a power commensurate with their new character? One fundamental quality of our constitution I have always conceived to be the recognition of popular influence in the government. But how is the amount of that influence to be determined? In my opinion, solely by the real and actual power enjoyed by the people. When that power was inconsiderable, the popular influence in the government was inconsiderable also, and constitutionally so; but when that power became great, the popular influence in the government became great also, and in this change, too, the spirit of the constitution was preserved.

It appears to me, therefore, that in endeavouring

to assume that station in the government, which it was the interest of the country that they should fill, the commons acted upon the soundest constitutional principles, and that in vindicating their privileges against the pretensions of James, they acted in perfect accordance with the spirit and conduct of their predecessors.

R. E.

It would have been well if James and his children had entertained the same views.

SIR R. E.

The grand error of the Stuarts was their mistaken notions of their own powers, and a belief that all popular influence was an encroachment upon it. But this subject must not be discussed at the termination of a conversation.

CONVERSATION VII.

HISTORICAL SKETCH. — CHARLES I.

CHARLES I. — State of the kingdom on his accession. — Temper of Parliament. — Privy Seals. — Compulsory knighthoods. — A new parliament. — Grievances. — The king menaces the commons. — The Duke of Buckingham denounced. — The commons issue a warrant to search the signet office — the king's displeasure — members committed to the tower. — Parliament dissolved — their remonstrance ordered to be burned. — Loans and benevolences. — Various persons imprisoned for withholding money. — Writs of Habeas Corpus denied. — A new parliament — the king's high language. — Debates of the commons. — Petition of right — Mr. Hume's representation of that measure. — Infraction of it by the king. — Cruel decrees of the Star chamber. — Torture. — Felton. — Protestation of the commons — Numbers imprisoned — sent to foreign gaols. — Death of Sir John Elliott — Laud and Strafford. — State of government during the intermission of parliaments. — Illegal taxes. — Monopolies. — Abuse of justice. — Council of York. — State of the country. — Rigour of the Star chamber. — Prynne, Bastwick, and Burton. — Case of ship money. — Noble conduct of Lady Croke.

SIR R. E.

WE must now prepare ourselves for the examination of certainly the most important portion of the subject to which we have devoted ourselves,

— the history of those singular times, when all the great principles upon which our constitution is founded were brought into active play, and the vast machine of government was dissected. In entering upon this subject I would entreat you, once more, to approach it with dispassionate feelings, and, as much as possible, to form your judgment upon it, with reference merely to *events* and their *consequences*, without paying too strict a regard to the personal characters and intentions of the actors. Historians too frequently identify the character of the transactions which they relate, with that of the persons who achieve them; but I would have you look, with a steady eye, to the quality and result of the actions themselves. Both Charles and Cromwell *may* have imagined that they devoted themselves to the good of their country, and yet the conduct of both was most injurious to its true interests. Let us, therefore, endeavour to trace out the line of action which not only a good man, but a wise man ought to have pursued, leaving the intentions and hearts of the actors in this great drama, as matters too deep for our search.

R. E.

Do you not think that, by not observing this course, Hume has fallen into a great error?

SIR R. E.

Certainly I do. His History of the Stuarts is,

in fact, a defence of the personal character of those sovereigns; and in order to render his apology complete, he has been compelled to colour and pervert his facts in a manner altogether unjustifiable.

R. E.

Before you proceed to the transactions of this reign, you will, perhaps, be good enough to say a few words as to the state and feelings of the people at its commencement.

SIR R. E.

I will, if you desire it; though, perhaps, our last conversation contained as much information on this head as may be necessary. You cannot fail to have observed, that during the reign of James I. the power of the commons had sensibly increased, and that they had become sensitively alive to every infraction of their liberties. The contests in which they had engaged with the king, served at once to nourish these feelings, and to give confidence to the popular party; so that, on the death of his father, Charles I. found the nation fully prepared to assert and maintain their just privileges. The great question of religion also operated, at this time, most powerfully upon the minds of the people. Having begun to vindicate their freedom in spiritual matters, it was not probable that they would submit to oppression in temporal affairs. We must also recollect that

the power of the crown had not grown in an equal ratio with that of the people. The feudal character of the government, which conferred so complete a supremacy upon the king, and gave him a power so ample over the lower ranks, through the means of his military retainers, was fast wearing away, while the modern expedient of a standing army was yet unknown. The actual power of the sovereign, therefore, had materially decreased; and it must have been obvious to an acute observer, that in the event of a breach between the king and his people, the chances of success were greatly in favour of the latter. But, like his father, Charles seems to have apprehended little danger from such a rupture, and to have trusted with implicit faith to the strength of the kingly name. At the same time, he engaged in undertakings which drained his treasury, and compelled him either to listen to the grievances of his subjects, or to raise his supplies without the intervention of the house of commons, a fatal expedient, which gave rise to the earliest troubles of his reign.

The temper of the parliament, on its first assembling, did not meet the wishes of the new sovereign. The subject of grievances speedily fell under discussion; and amongst those complaints, the state of religion was most prominent. Although a supply was voted, it soon became obvious that no farther grants of money were to be obtained without a redress of grievances, and parliament

was accordingly dissolved, having sate only about seven weeks.* Notwithstanding the poverty of his exchequer, Charles still resolved to pursue his warlike designs against Spain, and in order to furnish money for this purpose, privy seals were issued, one of the first illegal measures of this disastrous reign.† Soon afterwards, a further attempt was made to raise a supply, by calling upon all who had 40*l.* a year or more in lands or revenues in their own hands, to come in and receive the honour of knighthood, the fees upon which would have amounted to a considerable sum.‡ These illegal measures, however, were found insufficient to answer the desired purpose, and it again became necessary to summon a parliament. It met on the 6th February, 1625, (O.S.) and after an adulatory address from the lord-keeper, and the speaker, Sir Heneage Finch, the great subject of grievances was again taken into consideration. The disposition of the king's revenue, the multiplication of new impositions and monopolies, and the levying of tonnage and poundage without act of parliament, formed the chief grounds of complaint.‖

R. E.

And fortunately the commons possessed the means of enforcing attention to their complaints, by withholding the supplies.

* Rushworth, vol. i. p. 171. 191. † Ibid. p. 193.
‡ Ibid. p. 199. ‖ Ibid. p. 207.

SIR R. E.

They did withhold them, to the great displeasure of his majesty, who sent a message to the speaker, to quicken the benevolence of his faithful commons. * To this message a respectful and temperate reply was made by the commons, which appears to have excited the royal anger, for the answer to it terminated with the following remarkable menace: "I would you would hasten for my supply, or else it will be worse for yourselves, for if any ill happen, I think I shall be the last shall feel it." † No way terrified by this ungracious threat, the house proceeded with the great work which they had in hand, and, in particular, denounced the Duke of Buckingham as the chief cause of the misfortunes under which the country laboured. In the debate upon this question, Mr. Clement Coke, the son of the celebrated lawyer, observed, "that it was better to die by an enemy, than to suffer at home," a remark which drew down upon the commons the reprehension of the king, "who desired the justice of the house against the delinquent." ‡ Instead of complying with this command, the commons proceeded in the debate respecting Buckingham's misdemeanors, until Charles's patience being exhausted, he summoned parliament to Whitehall, where, with the assistance of the Lord Keeper, he

* Rushworth, vol. i. p. 214. † Ibid. p. 217.
‡ Ibid. p. 218.

read them a long and severe lecture. He complained in bitter terms of the insolence of the commons, whose committees had presumed to examine the letters of secretaries of state, nay, his own; and had sent a general warrant to his signet office, commanding his officers not only to produce and show the records, but their books and private notes which they had made for his majesty's service. *

H. E.

This was certainly going a good way.

SIR R. E.

It was so; and it might have convinced his majesty, that those who could venture thus far, were not likely to be deterred by empty threats from prosecuting their purposes further. He seems, however, to have imagined that it was yet possible to work upon their fears, and, accordingly, at the conclusion of his speech, he observed, "Remember that parliaments are altogether in my power for their calling, sitting, and dissolution; therefore, as I find the fruits of them good or evil, they are to continue, or not to be; and remember, that if in this time, instead of mending your errors by delay, you persist in your errors, you make them greater and irreconcileable." †

H. E.

This was really equivalent to a denunciation of

* Rushworth, vol. i. p. 223. † Ibid. p. 225.

war. Had the commons yielded at this point, it would have been an open confession, that they depended solely upon the king's will.

SIR R. E.

There was small chance of their so doing. On their return, the commons deliberated with locked doors on this extraordinary address; and though an explanation of it was attempted by the Duke of Buckingham, they persevered in framing a remonstrance, in which, amongst other things, they justified their proceedings in searching the signet office.* The king, on the other hand, seemed determined to support his favourite at all hazards, and committed Sir J. Elliott and Sir Dudley Digges to the Tower for the active part which they had taken in the impeachment of Buckingham. The result of these misunderstandings was the dissolution of Charles's second parliament, on the 15th June, 1626, though not without a remonstrance being previously prepared, which was afterwards ordered, by the royal proclamation, to be burnt. His majesty, on the other hand, issued a declaration in justification of his measures.†

Having thus freed himself from the galling complaints of the commons, Charles resorted once more to those illegal modes of raising money which had formerly proved so unsuccessful. An

* Rushworth, vol. i. p. 243. † Ibid. p. 400. 406. 412.

order in council was promulgated, directing all customs to be levied and paid; loans and benevolences were again introduced, and, lastly, the principal ports of the kingdom were required to furnish a certain number of vessels, the origin of the fatal claim of ship-money.* The directions given to the commissioners for raising the loan, contain so clear a declaration of the temper and designs of the court, that I must call your particular attention to them. Amongst other things, the commissioners are ordered, "that they treat apart with every one of those who are to lend, and not in the presence and hearing of any other, unless they see cause to the contrary. And if any shall refuse to lend, or shall make delays or excuses, and persist in their obstinacy, that they examine such persons upon oath, whether they have not been dealt withal to deny or refuse to lend or make an excuse for not lending? Who hath dealt so with him, and what speeches or persuasions he or they have used to him tending to that purpose? And that they shall also charge every such person in his majesty's name, upon his allegiance, not to disclose to any other what his answer was." That the loan was not considered a gratuitous one, sufficiently appears from the following direction to the commissioners, "that they admit of no suit to be made, or reasons to be be given, for the abating of any sum, the time and

* Rushworth, vol. i. p. 413. 415.

instant occasion not admitting any such dispute." Nor was the court slow to inflict vengeance upon those who refused to submit to this imposition. Many knights and gentlemen of character, amongst the most remarkable of whom were Sir Thomas Wentworth, afterwards earl of Strafford, John Hampden, and Sir John Elliott, who had already suffered for his attachment to liberty, were sent to various distant prisons in order to terrify the country into submission.* Many of the injured parties applied for redress to the courts of law, but the vigilance of the crown had anticipated them. Sir Randolph Crewe, the chief justice, a man highly regarded for his learning and probity, had been removed, and Sir Nicholas Hyde, who had recommended himself to the favor of the court by preparing Buckingham's defence against the impeachment of the commons, had been substituted in his place. To the influence of Hyde must be attributed the decision of the court of king's bench upon the legality of these imprisonments. The warden of the fleet returned to the writ of *habeas corpus*, that the parties were detained in his custody by the special command of the king, and it was adjudged by the court, that this return was sufficient, and could not be questioned†; a decision which at once placed the personal liberty

* Rushworth, vol. i. p. 428.

† Ibid. p. 458. State Trials, vol. iii. p. 1. Whitelocke's Mem. p. 8.

of every subject in the realm at the disposal of the government. Triumphant as the court was at such a decision, the further prosecution of this design to intimidate the people seemed full of difficulty. It soon became evident, that submission was not to be expected from the imprisoned gentry; and yet to subject them to perpetual confinement was a bolder measure than even Charles's ministers ventured to propose. At length, probably on the advice of Sir Robert Cotton, the celebrated antiquary, who was consulted by the king on this exigency of affairs, it was resolved, that another parliament should be assembled; preparatory to which, the persons who had been imprisoned on account of the loan were directed to be set at large, and orders were issued to the lord mayor and aldermen "to use moderation in the demanding of the loan-money from those of the city of London who deferred payment."* On the 17th March, 1627–8, the third parliament of Charles's reign assembled.

The royal pretensions were as lofty as ever. In his address the king talked boldly of "the other means which God had put into his hands," if his parliament "should not do their duties;" and the lord keeper assured the assembled lords and commons, that his majesty was not destitute of other means, than their votes, of raising supplies; for which necessity and the sword of the

* Rushworth, vol. i. p. 474.

enemy might make way. * These reiterated threats did not prevent the commons from at once proceeding to the consideration of the grievances with which the kingdom was afflicted; and a long debate ensued, remarkable for the energy, zeal, and ability, with which several members animadverted upon the late proceedings of the court. In particular Sir Edward Coke, the highest legal authority in the kingdom, denounced in strong terms the practice of raising money by loans.

H. E.

I admire old Sir Edward's vehement harangues; pray let us hear what he says.

SIR R. E.

"The king cannot tax any by way of loans. I differ from them that would have this of loans go amongst grievances; but I would have it go *alone*. I'll begin with a noble record — it cheers me to think of it — 25 Edw. III. It is worthy to be written in letters of gold; loans against the will of the subject are against reason, and the franchises of the land; and they desire restitution. What a word is that franchise! The lord may tax his villein high or low; but it is against the franchises of the land for freemen to be taxed [but] by their consent in parliament." † The result of the debates on this question was certain resolutions,

* Rushworth, vol. i. p. 477. 479. † Ibid. p. 501.

the principal of which was, that the writ of *habeas corpus* may not be denied, though the party be committed by command of the king or privy council. *

R. E.

A refusal to contribute to the loans was also, if I remember rightly, punished by sending the offender abroad into a sort of honorable banishment.

SIR R. E.

It was; "designation for foreign employment" formed one of the grievances of the commons. Sir Peter Hayman was despatched into the palatinate, † and it was in contemplation to remove Sir Edward Coke by sending him into Ireland. The debates on the personal liberty of the subject ended with this important resolution, "that no freeman ought to be confined by any command from the king or privy council, or any other, unless it be by act of parliament, or by other due course or warrant of law."‡ Not content, however, with this declaration, the commons determined to frame a petition to the king, praying for redress of grievances; in which, after long conferences, the lords joined. The prayer of this petition, known by the name of the Petition of Right, was, that no one should be compelled to yield any loan, gift, benevolence, or tax, without assent of parliament;

* Rushworth, vol. i. p. 513. † Ibid. p. 522.
‡ Ibid. p. 523.

and that no one should be imprisoned for refusal thereof; that the grievance of billeting soldiers should be remedied, and that the commissions for proceeding by martial law should be revoked. * The king attempted to avoid the effect of this petition by an evasive answer, " that right be done according to law, and that the statutes be put into due execution;" but finding this reply unsatisfactory, he at length granted the petition in the usual form " *soit droit fait, come il est désiré,*" to the universal joy of the nation. †

R. E.

Pray, is not Hume's assertion, that the Petition of Right produced such a change in the government as was almost equivalent to a revolution, rather too broad?

SIR R. E.

It is much too broad, for surely it was no new principle in our constitution, that taxes could only be levied by assent of parliament, and that they who refused to pay taxes imposed without such assent, were not liable to imprisonment; nor was it any new regulation, that the subject should not, in time of peace, be governed by martial law, yet these are termed by the historian " beneficial *concessions*," and " sacrifices of prerogative, the greatest by far ever made by an English sovereign." In truth it was a concession of that

* Rushworth, vol. i. p. 590. † Id. p. 613.

which he never possessed, a sacrifice of prerogatives with which he was never invested. But taking it as a concession, Charles ought certainly to have observed his compact; yet so far was he from this, that, in the very face of the petition, he continued to collect the tonnage and poundage, though no grant of that tax had been made to him by parliament. Upon this the commons prepared a remonstrance, the delivery of which the king prevented by a sudden prorogation, on the 26th June 1628.*

During this prorogation, various circumstances occurred which illustrated the temper and designs of the court. The star-chamber began once more to act with vigour, and condemned a man of the name of Savage to lose his ears. The assassination of the Duke of Buckingham also furnished the king with an opportunity of displaying his feelings. By Charles's desire, and at the instigation of Laud, a question was propounded to the judges, whether by law the assassin might not be racked, and whether there were any law against it; "for," said the king, "if it might be done by law, he would not use his *prerogative in this point.*" † The judges unanimously agreed, that Felton could not be put to the rack, for that no such punishment was known or allowed by our law. Charles however made a further attempt; for the criminal having offered the hand that did the act to be cut off,

* Rushworth, vol. i. p. 632. † Id. p. 638.

"the king sent to the judges to intimate his desire, that his hand might be cut off before execution; but the court answered that it could not be." *

H. E.

And this is the monarch whose "humanity" has drawn down the praises of Mr. Hume!

SIR R. E.

During the prorogation, also, the Petition of Right had been infringed, by the extortion of customs, and by the imprisonment of some persons who resisted these illegal courses. On the reassembling of parliament, therefore, it was the first business of the commons to proceed in their inquiries into these repeated grievances; and warm debates ensued, in which some of the king's advisers, and especially Weston, the lord treasurer, were fiercely attacked. The king, finding himself unable to manage the house as he could have wished, resolved again to adjourn them. The speaker, having communicated the royal message to that effect, was about to leave the chair, when he was forcibly detained by several members, while a protestation was read against innovations in religion, and the levying of tonnage and poundage. The house then, in great disorder, adjourned; but before they could meet again, parliament was dissolved by proclamation. †

* Rushworth, vol. i. p. 640. † Id. p. 660. 2 March, 1628-9.

Such of the commons as had distinguished themselves by their activity in preparing the protestation, were summoned before the council, and committed to prison. They obtained writs of *habeas corpus;* but on the day on which they ought to have been brought into court, it appeared that they had been removed into different prisons by special command of the king, who attempted to justify this extraordinary denial of justice, by insisting upon the "insolent and unmannerly carriage" of the prisoners.* Ultimately, however, they were permitted to be bailed, provided they would find securities for their good behaviour; — a dangerous and indefinite condition, with which they did not choose to comply. An information was now exhibited against three of the members in the King's Bench, and, by the judgment of that court, they were fined, and sentenced to be imprisoned during the king's pleasure. That imprisonment proved fatal to Sir John Elliott, one of the most eloquent and distinguished men of his day. He had in vain petitioned for his liberty, on the score of sickness, to which his physician bore testimony;† but his majesty's pleasure was, that he should remain in confinement. Let me here point out to your indignation the observation of Hume upon this passage of our history. "Because Sir John Elliott *happened* to die, while in custody, a great clamour was raised against the

* Rushworth, vol. i. p. 680. † May's Parliament, p. 14.

administration, and he was universally regarded as a martyr to the liberties of England."

R. E.

And he terms the conduct of the court an *affectation* of severity.

SIR R. E.

There is little reason to suppose that the king's anger was feigned. The continued resistance of the commons had, undoubtedly, greatly incensed him; insomuch that a proclamation was issued, in which it was stated that the king "would account it presumption for any to prescribe any time to his majesty for parliaments." * In fact, upon the late dissolution, Charles had resolved that he would not again assemble a body of adversaries, who had hitherto traversed all his most favourite projects. Instead of resorting to that great council, which the constitution pointed out as his advisers, he now abandoned himself almost entirely to the direction of two men, who, from this period till the tragical termination of their lives, played a most conspicuous part in the government of affairs, — Laud and Strafford, with whose characters you are both of you sufficiently acquainted.

For the space of nearly twelve years, Charles continued to govern without parliaments; and the nation, during this period, exhibited a picture of the most odious misrule. It is necessary, how-

* Rushworth, vol. ii. p. 3.

ever, that we should examine at some length the proceedings which took place during this period, in order to form a correct opinion upon the measures adopted by the long parliament, and upon the great question of the civil war which ensued.

Tonnage and poundage continued to be levied as usual; and as the merchants, to avoid this imposition, attempted to send their goods into Holland without landing them at the ports, an order was made enabling the messengers of the council table to enter into any ship or warehouse, to search any trunk or chest, and to break any bulk whatsoever, in default of payment of customs; and in this arbitrary edict, the very necessary power was superadded of "apprehending all persons that should give out any scandalous speeches against his majesty's service, or cause any disturbance." *

Another mode of filling the exchequer was found in the revival of those illegal patents and monopolies, which, as we have seen, caused so much discontent in the preceding reign. "Multitudes of monopolies were granted by the king, and laid upon all things of most common and necessary use, such as soap, salt, wine, leather, sea-coal, and many other of that kind." † All who held crown lands were called upon by proclamation, to come in and procure a confirmation of their titles, on payment of a sum of money, and

* Rushworth, vol. ii. p. 9. † May's Parl. 11.

they who refused were threatened with the loss of their property. Commissions were issued to compound with persons who, as it was alleged, were compellable to assume the expensive honour of knighthood.* The infamous forest laws were revived, and arbitrary and enormous fines were imposed upon various noblemen and others for alleged encroachments upon the bounds of the forests, which were now extended over lands that had been held in private hands for three or four centuries.

But the most deadly blow at the breast of freedom was aimed through the sides of justice. To establish an arbitrary power unsupported in any degree by the sanction of public opinion, was an attempt which even Charles had not the rashness to make, and he was, therefore, most anxious to give the semblance of legal authority to his proceedings. The judges of the common law courts, corrupt as they were, could not be altogether relied upon, and new judicatures were therefore erected, which might be more completely under the control of the crown. The earl marshal's court had additional powers conferred upon it, and imposed heavy punishments for matters not cognizable by the common law; † the council of York, which had been the subject of complaint in the last reign, now, under the

* Rushworth, vol. ii. p. 70.
† Clar. Hist. vol. i. p. 68. Life, p. 37.

presidency of Wentworth, exercised the most arbitrary and oppressive jurisdiction over all the northern counties *; and, in addition to these, the star chamber and the high commission displayed a vigour, which we shall soon have occasion to notice more particularly.

At this fearful conjuncture, when "the thunder was heard afar off, rattling in the troubled air," the opinions of men were as various as their characters and circumstances. Many of the lords and gentlemen who felt not the pressure of the government, and found that they could still enjoy the plenty of their fortunes, did nothing but applaud the happiness of England when compared with other countries, calling those who complained of the breach of laws and liberties, ungrateful and factious spirits. The courtiers went further, and expressed their hopes that the king would need no more Parliaments; while many who held the highest posts at court, turned into jest every mention of liberty. The common people in general, and the freeholders of the country, took a more accurate view of the state of affairs, and, for the most part, showed themselves sensible of their rights and their injuries. All who thought seriously and justly upon the dangers to which the kingdom was exposed, were filled with sad thoughts, and presages of the approaching storm, convinced that matters had now been car-

* See Hide's Speech, Rushw. vol. ii. p. 162.

ried so far as to threaten either a galling servitude for themselves and their posterity, or a vindication so terrible, as to fill the country with groans and lamentation.* The tempest, however, was not yet ready to burst. It required more wrongs to be wrought, before a whole nation could be driven into open resistance; but Charles lost no time in his attempts to force matters to that rare and perilous crisis.

R. E.

How blind must Charles have been not to perceive the strength of the body to which he was opposing himself!

SIR R. E.

Blind indeed! he seems to have imagined it no difficult task to enslave a whole nation, aware and jealous of its rights. In his notions of his adversaries' weakness, he was encouraged by his counsellors, and especially by Wentworth, whose overbearing spirit despised opposition: "I am confident," says that minister in a letter to Laud, "that the king, being pleased to set himself in this business, is able, by his wisdom and ministers, to carry any just and honourable action through all imaginary opposition, for real there can be none; that to start aside for such panick fears, phantastic apparitions as a Prynne or an Elliott shall set up, were the greatest folly in the whole world."†

* See May's Parl. p. 12.

† Straff.'s Lett. and Disp. vol. i. p. 178. Brodie, vol. ii. p. 291.

Acting under the guidance of advisers like these, Charles imagined that nothing could be more beneficial than to impress the minds of his subjects with some severe examples of royal vengeance; forgetful, that while mean spirits are awed and subdued by violence and injustice, men of a nobler temper find their courage thereby fed and strengthened. One of the first persons selected at this period, upon whom to exercise the rigor of the star chamber, was Dr. Alexander Leighton, a learned but bigoted man; who had published a book reflecting severely upon the bench of bishops. The sentence for this offence was, that he should pay a fine of 10,000*l.*, be degraded, set in the pillory, whipped, have one of his ears cut off, his nose slit, and his face branded; again pilloried, again whipped, his other ear cut off, and, lastly, be imprisoned for life;* a sentence executed with the same barbarity which dictated it, the second whipping and cutting being inflicted before the sores upon his back, ear, nose, and face were cured. † This atrocious sentence was matched by another, pronounced against the learned Prynne, for the publication of his "Histrio-mastix, or a Scourge for Stage Players;" for which he was sentenced to stand twice in the pillory, to lose both ears, to pay a fine of 5000*l.*, to be degraded from the bar, and to be imprisoned for life. ‡ Another example will

* State Trials, vol. iii. p. 885. † Id. p. 386. ‡ Id. p. 562.

be sufficient to exhibit the iniquity and cruelty of these star-chamber decrees. Prynne, undismayed by his sufferings, had published another work, which was esteemed libellous, and Bastwick a physician, and Burton a divine, had been guilty of a similar offence. The three were, therefore, sentenced by the star chamber to undergo a punishment similar to that which Prynne had suffered, though part of the sentence upon the latter was incapable of being twice executed. His ears had already been cut off, but as the operation had not been thoroughly performed, the executioner was directed to cut off the remainder of his ears, which he did "in an extraordinary cruel maner."*

R. E.

I remember the account in the state trials, from which you quote, and the noble conduct of Bastwick and Burton's wives; pray let me read it to you. "The doctor went first upon the scaffold, and his wife immediately following came up to him, and saluted each ear with a kiss, and then his mouth. Her husband desired her not to be in the least manner dismayed at his sufferings, and so for a while, they parted; she using these words, Farewell, my dearest, be of good comfort; I am nothing dismayed. Mrs. Burton sending commendation to him (Burton) by a friend; he returned the like to her, saying, commend my love

* State Trials, vol. iii. p. 754.

to my wife, and tell her, I am heartily cheerful; and bid her remember what I said to her in the morning, namely, that she should not blemish the glory of this day with one tear, or so much as one sigh. She returned answer, that she was glad to hear him so cheerful, and that she was more cheerful of this day than of her wedding-day. This answer exceedingly rejoiced his heart, who thereupon blessed God for her, and said of her, She is but a young soldier of Christ, but she hath already endured many a sharp brunt, but the Lord will strengthen her unto the end. And he having on a pair of new gloves, showed them to his friends thereabout him, saying, My wife, yesterday, of her own accord, brought me these wedding gloves; for this is my wedding-day." *

SIR R. E.

Thank you for reminding me of these passages; the beauty and feeling of which, I am happy to see, have made a proper impression upon your memory. The courageous tenderness of these high-minded women must have inspired even the most degenerate spirit with a resolute heart; and must have bestowed upon their suffering husbands a double strength of constancy.

I cannot detail to you all the various instances of mis-government and oppression of which Charles was guilty, after the dissolution of his parliament.

* State Trials, vol. iii, p. 758.

The great case of ship-money, however, demands more particular attention. The methods which the king had hitherto employed to raise a revenue, had so far failed, that it became necessary to resort to some new expedient to supply the wants of the exchequer, and the obsolete demand of ship-money was renewed for this purpose. In former times, when the country was subject to incursions from foreign powers, it had been the practice for the sovereign to command the maritime towns, to provide a certain number of ships, in order to oppose the enemy, and upon this foundation, Charles resolved to tax every county a certain sum of money for the ostensible purpose of supporting the navy. To justify the exertion of a power so inconsistent with a free government, (since it was, in fact, only another mode of raising supplies, without the assent of parliament,) application was made to the judges for their opinion upon the legality of this imposition; and to their own deep disgrace, and to the discredit of the court, who wrought upon them by threats and promises, an answer was obtained from them recognizing the king's prerogative in this point. His majesty was declared to be the only judge, both of the number of ships required, and of the necessity for requiring them; * and he was thus invested with an almost unlimited power of taxation. Even Clarendon speaks, in terms of well-merited severity, of these

* St. Tr. vol. iii. p. 844.

"judges, as sharp-sighted as secretaries of state," of the "reasons of state urged as elements of law," and of the "judgment of law grounded upon matter of fact, of which there was neither urgency nor proof,"* and tell us, that "the damage and mischief cannot be expressed, that the crown and state sustained by the deserved reproach and infamy that attended the judges, by being made use of in this and like acts of power." The fearful extent to which the principle of this decision was carried by the court, appears from a letter of Wentworth, who infers from this case a power in the crown to raise payments in a similar manner for land forces.† The obvious danger of submitting to an imposition so unconstitutional as that of ship-money, at length roused a spirit of resistance, and an assertor of the rights of his countrymen was found in the person of John Hampden. He contested the legality of the tax; but the judges who had already pledged their opinion on the subject, confirmed it in their judgment against Hampden. For "the impertinencies, incongruities, and insolencies,"‡ with which the orations of the judges abounded, I must refer you to the history of this great trial. I shall only say, that positions were laid down by the bench at open variance with what had been repeatedly declared to be the fundamental principles of the constitution.

* Clar. Hist. vol. i. p. 123.
† Wentw. Let. and Disp. vol. ii. p. 61.
‡ Clar. Hist. vol. i. p. 126.

H. E.

You must not forget to state, that *all* the judges did not concur in this disgraceful judgment. Four of them dissented from their brethren.

SIR R. E.

They did; and one of them, Sir George Croke, is said to have been induced to pursue this honourable course by the persuasions of his wife, whose noble exhortation to him sheds a light upon her memory which can never grow dim. "She told him she hoped he would do nothing against his conscience, for fear of any danger or prejudice to him or his family, and that she would be contented to suffer want, or any misery with him, rather than be the occasion for him to do or say any thing against his judgment or conscience." *

* Whitelocke, p. 25.

CONVERSATION VIII.

HISTORICAL SKETCH. — CHARLES I. (*continued*). THE COMMONWEALTH AND THE PROTECTORATE.

Arbitrary character of the government. — State of public feeling. — New parliament. — Excuses offered for illegal taxation. — Grievances. — Parliament dissolved. — Members imprisoned. — Ship-money levied. — Public tumults. — New parliament. — Prynne, Bastwick, and Burton recalled from foreign prisons. — Clarendon's description of the scene. — Strafford attainted. — Act for the perpetual parliament. — Star chamber and high commission abolished. — Jealousy of the king entertained by parliament; and attempted seizure of the five members. — Civil war. — Success of the Independents. — Trial and execution of the king. — Proceedings of the long parliament. — Character of their government. — Arbitrary measures. — Cromwell. — The little parliament. — Cromwell made protector. — Character of his government. — General observations.

SIR R. E.

LIKE the parliament, we must this morning again take into consideration the great subject of grievances. Among the heavier complaints of ship-money and illegal taxation, you will find some of a lighter character recorded, but which are, perhaps, equally characteristic of the temper of the

court. For instance, we find a proclamation against hackney coaches, on the 19th of January, 1635, from which we learn that his majesty, perceiving that of late the great number of hackney coaches had grown a great disturbance, he commanded that, in future, none should be employed except to travel, at least, three miles out of London or Westminster; and his majesty, also, ordered that no person should go in a coach in the streets of London or Westminster, unless the owner of the coach should constantly keep four sufficient able horses fit for his majesty's service, whenever his majesty's occasions should require them. *

R. E.

This proclamation was worthy of James I., and, I suppose, equally legal with those which were denounced by Sir Edward Coke and the Judges.

SIR R. E.

It was so; but its legality was a matter of small moment, when they who offended against it were summoned before the privy council.

H. E.

You said just now that this portion of Charles's reign exhibited a picture of all the evils that flow from bad government; and yet Clarendon tells us the nation was never in a more prosperous condition. "I must be so just as to say that

* Rushworth, vol. ii. p. 317.

during the whole time these pressures were exercised, and these new and extraordinary ways were run, —"

SIR R. E.

Pray mark the expression of the noble historian, — *new* and extraordinary; an expression very hostile to the representations of Hume, who would persuade us that the measures of the court, however impolitic, were certainly not new.

H. E.

— "And these new and extraordinary ways were run, that is, from the dissolution of the parliament in the fourth year, to the beginning of this parliament, which was above twelve years, this kingdom, and all his majesty's dominions, enjoyed the greatest calm and the fullest measure of felicity that any people, in any age, for so long time together, have been blessed with, to the wonder and envy of all the other parts of Christendom."*

SIR R. E.

To this I answer, that the improvement of the kingdom was not the consequence, but in despite of the conduct of the crown. I resemble (I confess) the mutinous and discontented spirits whom Clarendon mentions, who were "more troubled and perplexed with the violation of one law, than delighted or pleased with the observation of all

* Clarend. Hist. vol. i. p. 131.

the rest of the charter; never imputing the increase of their receipts, revenue, and plenty to the wisdom, virtue, and merit of the crown; but objecting every small imposition to the exorbitancy and tyranny of the government." I have certainly failed in my attempt to discover the "wisdom, the virtue, and the merit of the crown;" qualities which were little apparent in the impolitic, unjust, and severe measures which distinguished the period to which the historian refers. The people themselves were, after all, the best judges of their own happiness, and they found little content in this felicitous state of things, as sufficiently appeared on the assembling of the new parliament. The immediate cause of its assembly was the straits and distress to which the king had been reduced by the unsuccessful issue of his dispute with the Scotch, for the reduction of whom his majesty requested a speedy supply from the commons. In making this demand the lord keeper thought proper to offer some excuse for the taking of tonnage and poundage without consent of parliament. "His majesty," says his lordship, in his speech to the commons, "His majesty hath commanded me to declare unto you that he hath taken it only *de facto*, according to the example of former kings, from the death of their predecessors till the parliament had passed an act for it themselves; that, in like manner, his

majesty desires not to claim it, but by grant of parliament." *

R. E.

Here, then, we have a full confession of the illegality of the courses which had been so long pursued by the court. Not only had there been ample time to assemble a parliament for the purpose, —

H. E.

About sixteen years, I think.

R. E.

But parliaments had been actually held, who had never made the grant: whereas the authorities insisted on by the lord keeper only show, at the utmost, that the crown had exercised the power of levying this tax provisionally until such time as a parliament might be assembled.

SIR R. E.

Certainly the apology of the lord keeper was not a very satisfactory one; and of that opinion the commons appear to have been; for, omitting the affairs of Scotland, they immediately proceeded, on their assembling, to take into consideration the grievances of the kingdom, which it was proposed to treat of in the following order: 1. Grievances against the liberty of parliament; 2. against the preservation of religion; 3. against the conservation of the common liberties of the

* Parl. Hist. vol. viii. p. 404.

kingdom. * The member who opened the subject to the house was Harbottle Grimston, Esq., who was succeeded by Mr. Pym, a man, as Lord Clarendon says, "of good reputation," who, in a speech which occupied more than two hours, presented a striking picture of the oppressions under which the nation laboured. The house then came to a resolution to enquire into the proceedings against Sir John Elliott and some other members of the last parliament, who, as you will remember, were punished in various ways for opposing the designs of the court. Though the king, in his anxiety to obtain a supply, summoned the commons to Whitehall, in order to hasten their proceedings, the house still resolved to prefer grievances to the supply; a "preposterous course," which his majesty was pleased, in his speech to the lords, to designate a "putting the cart before the horse." † Other messages to the same effect were delivered to the commons, but in vain; and the king, irritated by the delay, and the complaints of the house, dissolved the parliament. ‡

R. E.

Does not Clarendon censure the dissolution of this parliament?

SIR R. E.

He does; and thereby impliedly eulogises their

* Parl. Hist. vol. viii. p. 450. † Id. p. 448.
‡ Id. p. 467. 5 May, 1640.

conduct. "There could not," says he, "a greater damp have seized upon the spirits of the whole nation than this dissolution caused, and men had much of the misery in view which shortly after fell out. It could never be hoped that more sober and dispassionate men would ever meet together in that place, or fewer who brought ill purposes with them; nor could any man imagine what offence they had given which put the king upon that resolution." * Charles thought it necessary to publish a defence of his conduct, containing expressions by no means calculated to allay the jealousies of the nation, and accusing the commons of having, "in a very audacious and insolent way, entered into examination and censuring of the government, as if kings were bound to give an account of their regal actions, and of their manner of government, to their subjects assembled in parliament." † At the conclusion of this vindication, his majesty expresses a resolution "so to provide that all his loving subjects may still enjoy the happiness of living under the blessed shade and protection of his royal sceptre." In accordance, I presume, with this resolution, the king, immediately after the dissolution of the parliament, committed several members to prison, viz. Sir John Hotham, Mr. Bellasis, and Mr. Crew; and the study, cabinet, and even pockets of the Lord

* Clarend. Hist. vol. i. p. 246.
† Parl. Hist. vol. viii. p. 479.

Brooke were searched for papers. * The convocation (the sittings of which, by custom, began and ended with those of parliament) was continued by a new writ, for the purpose of raising money, a proceeding which Clarendon acknowledges to have been illegal. † Numerous writs for the levying of ship-money were issued, the bullion in the Tower was seized, but ultimately released on the petition of the merchants ‡, and no method by which supplies might be raised was neglected.

R. E.

The court, surely, could not expect that these proceedings would be passed over by the nation in silence.

SIR R. E.

If they did, it was madness. Every thing demonstrated the improbability of such supineness. The sheriffs of the counties became negligent in the execution of the writs of ship-money, and several of them were ordered to be prosecuted in the star chamber. § The indignation of the public against the king's advisers manifested itself in a tumultuous attack upon Lambeth palace. ‖ Nor was that spirit confined to the lower orders; for several gentlemen, members of Lincoln's Inn,

* Parl. Hist. vol. viii. p. 489. May's Hist. Parl. 41. Rushworth, vol. iii. p. 1167.

† Clarend. Hist. vol. i. p. 261.

‡ May's Hist. Parl. p. 42. Rushworth, vol. iii. p. 1216.

§ Rushworth, vol. iii. p. 1173.

‖ Id. p. 1178.

were questioned before the council for drinking "Confusion to the archbishop of Canterbury." * The city of London, also, opposed the measures of the court, and three of the aldermen, who refused to give in the names of such persons within their wards who might be able to lend money to his majesty, were committed to prison †, while the gratuitous indignity was added of depriving the lord mayor of the sword.‡ The citizens also displayed their feelings by riotously entering St. Paul's, where the court of high commission usually sate, and pulling down the benches, crying "No high commission! No bishop!" § But the most dangerous symptom of all was, the mutiny of various parties of the soldiery, who appear to have been chiefly actuated by religious feelings. ‖

Under these circumstances, and in this distress, the king was once more driven to the dangerous expedient of calling together the representatives of the people; and, accordingly, on the 3d November 1640, that celebrated assembly met, which was afterwards distinguished by the name of the Long Parliament. Notwithstanding the many grievances under which the nation had, for so long a period, laboured, and the various disappointments which had been experienced in the attempts to procure redress, the temper of the parliament, on its first assembly, was just and moderate, insomuch that

* Rushworth, vol. iii. p. 1180.
† Id. p. 1181.
‡ Ludlow's Mem. p. 4.
§ Whitelocke, p. 33.
‖ May's Hist. p. 42.

Clarendon admits, that though very few of the members had "that inclination and reverence for the person of the king they ought to have had, scarce any of them had at that time that mischief in their hearts which they afterwards discovered against him; or, indeed, had the least purpose to rebel."* It is true that the commons, since the last parliament, had risen in their demands; but had the court, with readiness and sincerity, afforded the redress which the nation was entitled to ask, there seems to be little doubt that the fatal rupture which afterwards occurred might yet have been avoided.

The measures pursued by the new parliament soon demonstrated their determination and energy. Like their predecessors, they proceeded at once to the examination of grievances, which, as in the last parliament, were brought forward principally by Grimston and Pym, men of acknowledged character and consideration. On the fifth day after their meeting, it was ordered by parliament, that Prynne, Bastwick, and Burton, who, as you may remember, had been carried to Jersey, Scilly, and Guernsey, should be removed from those foreign prisons, to the places to which they were regularly first committed; and the return of these "scurvy fellows, scurvily used," † to adopt Clarendon's phrase, was hailed in a manner which might have taught the court how hazardous it must be to

* Clarend. Hist. vol. i. p. 287. † Id. p. 353.

break with the country. "But actions of that nature," says old May, "where the people of their own accords in a seeming tumultuous manner, do express their liking or dislike of matters in government, cannot have always the same success; but work according to the disposition of the prince or governor, either in a sense causing reformation, or to an hatred of them as upbraiders of his actions; *aut corrigunt aut irritant.*" *

R. E.

Does Clarendon give an account of their return?

SIR R. E.

He does, and rather a striking one. "Prynne and Burton being neighbours (though in distinct islands), landed at the same time at Southampton, where they were received and entertained with extraordinary demonstrations of affection and esteem; attended by a marvellous conflux of company, and their charges not only borne with great magnificence, but liberal presents given to them. And this method and ceremony kept them company all their journey, great herds of people meeting them at their entrance into all towns, and waiting upon them with wonderful acclamations of joy. When they came near London, multitudes of people of several conditions, some on horseback, others on foot, met them some miles from the town, very many having been a day's

* May's Hist. Parl. p. 54.

journey; and they were brought about two o'clock in the afternoon in at Charing Cross, and carried into the city by above ten thousand persons, with boughs and flowers in their hands; the common people strewing flowers and herbs in their ways as they passed, making great noise, and expressions of joy for their deliverance and return, and in these acclamations mingling loud and virulent exclamations against the bishops "who had so cruelly prosecuted such godly men." *

While the house was thus diligent in attempting to redress the injustice which had been committed, they were no less anxious to bring the evil advisers of the crown to punishment. In the foremost rank of these stood Strafford, who had contributed a large share to the present disasters of the country. On a charge of high treason preferred against him by the commons, he was committed by the house of peers to custody, and ultimately a bill of attainder was brought forwards against him, under which, as you know, he suffered the penalties of treason. That the moral and political guilt of Strafford might justify this severity, few who have studied his character and history can doubt; but the policy and the propriety of the measure must, certainly, be questioned. To force the construction of an act of parliament, and to strain the rules of evidence, were proceedings but ill calculated to

* Clarend. Hist. vol. i. p. 353.

inspire respect and confidence in the people; and I wholly coincide with Mr. Fox in the view which he has taken of this transaction. "He was doubtless a great delinquent, and well deserved the severest punishment; but nothing short of a clearly proved case of self-defence can justify or or even excuse a departure from the sacred rules of criminal justice; for it can rarely indeed happen, that the mischief to be apprehended from suffering any criminal, however guilty, to escape, can be equal to that resulting from the violation of those rules to which the innocent owe the security of all that is dear to them." *

H. B.

I think the attainder of Strafford is defended by Millar. †

SIR R. E.

It is, but not, as it seems to me, successfully. I cannot agree with that writer, that Strafford's offences might be held, "a compassing and imagining the death of the king," within the statute of treasons, 25 Edw. 3. Nor do I yield to the arguments of Mr. Brodie, ‡ for I do not conceive that a case of such urgent necessity can be made out as to justify the death of this great delinquent. It is impossible to say how many persons were alienated from the cause of the parliament, by this

* Fox's James II. p. 10.
† Millar on the English Government, vol. iii. p. 242.
‡ Brodie's British Emp. vol. iii. p. 102.

resort to a measure, as *illegal* as any of those of which the crown had been guilty.

H. E.

The execution of Laud, also, must fall under the same censure.

SIR R. E.

Certainly. At the same time I would have my opinions on this subject distinctly understood by you. If the death of Strafford and Laud had been necessary to the completion of the great work which the parliament had in hand, it cannot, I think, be denied, that the sacrifice was due to the public good. But I can scarcely suppose any possible case, in which it can be beneficial to a country to free herself, even from such enemies as Laud and Strafford, by breaking down the great and salutary rules of public justice.

With the bill for the attainder of Strafford, another was passed of a most extraordinary nature, the policy of which can be only justified by the singular circumstances in which the nation was placed. The determination of the king to govern without the assistance of a parliament, so long as his necessities would permit him, had been clearly evinced throughout the whole of his reign, and it was impossible for the present parliament to proceed with any confidence in their work of reformation, while they felt assured that, on the first convenient opportunity, the king would, in all proba-

bility, again free himself from their trammels by a dissolution. Under these impressions, it is not surprising that the parliament should make an effort to secure their continued existence; and though it must be admitted, with Clarendon, that the measure went "to remove landmarks," yet, as the exigencies of the state undoubtedly required some provision of the kind, the act "for the perpetual parliament," as it was afterwards called, must be regarded as a wise and necessary measure. By this statute, the parliament was not to be adjourned, prorogued, or dissolved, but by act of parliament. About the same time, those oppressive courts, the star chamber and the court of high commission, were abolished by statute, and the result of these salutary measures was seen in the temper and spirit of the people, which, as Clarendon tells us,* "both within and without the walls of the two houses grew marvellous calm and composed." Thus was another most favourable opportunity afforded to the king, of bringing to a happy termination the distractions of the nation; but the principles and temper which had caused the evil, now prompted him to persevere in the same course. Could the nation at this period have been convinced that Charles had been sincere in his acquiescence to the late reformatory measures, there is little doubt that the tranquillity of the country might yet have been secured on a firm and lasting

* Clarend. Hist. vol. i. p. 459.

basis. The transactions which had lately taken place in Scotland and Ireland, tended to confirm the suspicions of the commons, and from this period no true confidence appeared between the king and the parliament. * It is possible, indeed, that the jealousy entertained by the people was greater than even the conduct of the king could warrant; rash, dangerous, and illegal as that conduct had been: but it is difficult to set bounds to the fears and apprehensions of those who have once suffered from injustice and oppression, and we cannot be surprised, if we find the commons at this period even over vigilant in the protection of their rights. On the return of the king from Scotland at the close of the year 1641, a grand remonstrance on the state of the nation was presented to him by the house of commons, a measure of such doubtful policy, that it was only carried by a majority of nine. The commons, likewise, petitioned to be allowed a guard, a request which the king refused, adding, "upon the word of a king, that the security of all and of every one of them from violence, was, and ever should be, as much his care, as the preservation of himself and his children." †

It seems to have been the singular practice of this monarch to follow up his best professions with some new measure of imprudence and violence. On the day after the above declaration, Charles was guilty of an act which precluded all

* See May's Hist. of the Parl. p. 90. † Ibid. p. 91.

hopes of an accommodation between him and his parliament. Having determined to impeach the leaders of the parliamentary party of high treason, he had, on the preceding day, sent a sergeant at arms to the house of commons, for the purpose of apprehending Hollis, Haselrig, Pym, Hampden, and Strode. The sergeant at arms having been unable to fulfil his orders, the king on the following day resolved to go down to the house of commons in person, and demand the bodies of the accused. Accordingly, attended by a strong guard, he entered the house, and seating himself in the speaker's chair, he said, "he perceived that the birds were all flown;" for the accused members had, with the leave of the house, previously retired. This incident added strength to the jealousies of the country, and, in fact, prepared the way for that appeal to arms which soon afterwards took place.

I shall not attempt, nor is it necessary for our purposes, to trace the history of the civil war, or to recount the various negociations for the settlement of the nation, which took place between the contending parties. Whether there existed on either side a sincere desire that the great dispute should be compromised, and that Charles should resume his throne, under certain well defined and well guarded limitations, may, perhaps, be doubted; but, whatever the views of the king and the parliament were, they were defeated by the inde-

pendents, who, with the assistance of the army, seized the sovereign power of the state, and presented to the world the marvellous spectacle of a king arraigned before his own subjects, and executed for treason against his own state. This event, esteemed by some, a transcendantly noble act of justice, by others, an awful and almost inexpiable crime, requires a serious comment. That a king may, in the last resort, and for crimes, the gravity and extent of which call loudly for so perilous and appalling an interposition, be made amenable at the bar of his people, for his great transgressions, and receive at their hands the punishment due to his offences, is a doctrine, which every Englishman ought to hold sacred; since it is the sole principle upon which we claim the liberties guaranteed to us at the revolution. It is true, that the theory of the constitution leaves this extraordinary power undefined, and makes no provision for the application of it. The only rule that can be hazarded upon the subject is, that it is a power to be exercised only in the last extremity, and that the sense of the nation is to be collected in the most feasible manner. Now, although it is possible that the execution of Charles may be justified on the severe ground of necessity, yet it is most clear that his judges, constituted as they were under the influence of the army, and without any reference whatever to the choice of the nation, had not the slightest pretensions to

represent the people at large. The independents, whose opinions these men spoke, undoubtedly constituted a minority of the nation. To assert, therefore, that Charles was arraigned before his people, is to utter a gross historical falsehood. Whatever were his crimes and delinquencies, the tribunal before which he was dragged had no authority to adjudge upon them. His life was sacrificed, not as, possibly, in justice it might have been, at the altar of his country's welfare, but as an offering at the shrine of an imaginary republic.

On the destruction of the monarchy, in the person of the king, it might have been supposed, that the predominant party would have proceeded to erect a new form of government. The kingly office, and the house of lords were abolished by an ordinance of the commons *; and the actual powers of government, therefore, were vested in that remnant of the lower house, who retained their seats after the incursion of the military. In these persons the whole authority of the state was centered, and it was not, therefore, surprising, that they should hesitate, before they divested themselves of a power which it had cost them so much to obtain. In order, however, to provide an efficient executive, a council of state was appointed, consisting of not more than forty persons, to be rechosen annually; and, under this form of

* Scobel, p. ii. c. 16.

government, the commonwealth was administered until the usurpation of Cromwell.

R. E.

You call it a commonwealth, — but what claims had it to that title? Did the commons of that day actually represent the people in their opinions and feelings?

SIR R. E.

Undoubtedly they did not. The unwillingness with which they listened to every proposal of new modelling the representation of the people, and the delays which they threw in the way of their own dissolution, sufficiently evince the distrust which they felt of their popularity, while the facility with which their power was overthrown, by the very breath of Cromwell's mouth, without the least resistance on the part of the nation, confirms the idea, that they were never seated in the affections of the country. This fact at once stamps their power as illegitimate and wrongful. I will grant, that many of them were honest, and faithful, and virtuous men, sincerely desirous of establishing public happiness and liberty, upon a sure and lasting basis: — I will grant that they were, many of them, wise and valiant, before any of their generation, but I cannot see in their government, any thing but an usurped and dangerous authority. It is true, that the measures which they pursued raised the reputation of this

country, amongst the nations of Europe, to a very high pitch, and effected a salutary reform in some of the internal institutions of the country; but while the spirit of a free government was wanting, what guarantee had the nation against the abuse of so enormous a power? Supported as the parliament was, by the devoted zeal of one of the best disciplined armies in the world, resistance must have been futile. Fortunately, the men who composed that parliament, had, for the most part, the public good in view, and wielded their vast power for the public advantage; but their government was at best only a well ordered despotism, the most dangerous of all governments.

R. E.

But were they guilty of any thing like despotic conduct?

SIR R. E.

If I were to make the attempt, I think I could adduce several instances in point, which would have sounded ill even under the rule of the *tyrant* Charles. What could savour more strongly of a tyrannical spirit, than the act declaring what should be adjudged to be treason? by which it was ordained to be treason, "maliciously and advisedly to *affirm by writing or otherwise*, that the government settled in the form of a commonwealth (when, by the bye, the government had never been settled,) was tyrannical, usurped, or unlawful:" * an

* Scobel, 17 July 164 9.

enactment which rivals the despotic statute of Henry VIII.

The conduct of the parliament, also, with regard to the press *, furnishes clear evidence that they ill understood, or were unwilling to give effect to the first principle of a free government — the unbiassed expression of public opinion. Upon what basis was their authority founded, when they feared to have it shaken by the breath of such men as Lilburne and Clement Walker? The manner, too, in which the former was persecuted, was most discreditable to the character of the parliament, who did not hesitate in the exercise of a judicial power assumed by them for that and similar purposes, to inflict a sentence altogether unknown in our law, — that of banishment for life. The crime of which Lilburne had been guilty was slander. The parliament, also, unwilling to trust their enemies in the hands of a jury of their countrymen, erected a high court of justice for the trial of political offenders, a proceeding which sufficiently exposes the weakness of their cause, and the dangerous nature of their principles. It may be true, that parliament from this "seeming evil" intended to educe good, but had they applied it to the most destructive purposes, where was the remedy for the nation? With the purest intentions that ever dwelt in the hearts of statesmen, the parliament might, against the sense

* See post.

of their countrymen, lead the nation to ruin, and who was there to prevent it? A government like this, wise and politic as it in fact was, but depending for what may be termed its physical existence upon the military power, could not, it is obvious, be of long endurance; and at the very moment when the parliament was about to introduce some new arrangement respecting the representation of the people, it vanished, like some unsubstantial form, at the word of Cromwell. This circumstance alone proves the intrinsic worthlessness of such a government. Even granting with their defenders, that this body exhibited a rare union of wisdom, virtue, and discretion; yet of what value were those qualities, when their possessors were unable to retain the means of exercising them? Without stability, no government can avail in good or in evil; and without the concurrence of public opinion no government can be stable. At no period of our history have the people of this country been prepared to live under a republic.

H. E.

Do you think that Cromwell had become a convert to this idea, when he formed his design of assuming the title of king?

SIR R. E.

I fear that his conduct was the result of mere ambition; though there may be grounds for believing that he had persuaded himself of the im-

possibility of erecting a pure commonwealth in England. He must have been well convinced of the unsubstantial nature of the government which had been so termed, before he ventured upon the perilous exploit of destroying it. From the period of the achievement of that act, until his death, the sovereign power of this nation resided, in fact, in the hands of Cromwell; though, for some time, his policy compelled him to veil the extent of his influence. Yet, even in the first instance, he so far assumed the chief place in the state, as to issue a writ of summons in his own name for the assembly of a parliament. A council of state was likewise appointed, the majority of whom consisted of his own special friends; and he thus gradually prepared the way for ascending that fatal eminence which he subsequently occupied.

The body which thus met under the auspices of Cromwell, and which has received the appellation of the Little Parliament, entered upon their functions with all the solemnity and order of an actual representative. As if they really possessed the supreme power, they introduced measures of the highest importance, and meditated reforms which no parliament that ever yet sat within the walls of St. Stephen's chapel, have been able to effect. They particularly directed their attention to redressing the abuses of the law, and meditated the difficult design of reducing the vast and cumbrous frame of our legal institutions into a compact and

orderly system.* They dared not, however, to venture upon that awful task which the country would most have required at the hands of its true representatives, the remodelling and settling of the government upon a free and happy basis. They, doubtless, felt that they were the creatures of the lord general's will, and that however he might suffer them to attempt the regulation of the law, and other domestic institutions, yet that their annihilation must follow any rash endeavour to exercise that sovereign sway which was vested in the hands of their master. Notwithstanding this forbearance, they were not suffered to drag out their short existence, which was terminated like that of the Long Parliament, by a file of musqueteers.

Having thus violently put a period to their meetings, Cromwell procured from the majority of their abject body, a formal instrument of resignation, whereby they surrendered, as into the hands of their maker, the authority which had been derived from him.

R. E.

And thus the nation became accustomed to look upon him as the supreme man of the state, and were prepared to see him assume the express character.

SIR R. E.

Affairs were now speedily tending to that crisis, and on the fourth day after the resignation of the

* Exact relation, 13. 14. cited Godwin, vol. iii. p. 573.

Little Parliament, the lord general was, with great state and solemnity, installed lord protector, in Westminster Hall. At the same time a document was produced, which had been prepared by Cromwell and his creatures, entitled, "The Government of the Commonwealth of England, Scotland, and Ireland, and the Dominions thereto belonging," which purported to settle the government of those realms in a lord protector and parliament, and provided, in a manner sufficiently just and reasonable, for the system of representation. Till the meeting of the first parliament it was declared, that the protector and his council might have power to raise money for the public defence, and to make such laws and ordinances as the welfare of the nation should require, a power more full and dangerous even than that which was bestowed upon Henry VIII. * One of the most remarkable clauses of this instrument of government was, "that all bills passed by the parliament, should be presented to the lord protector for his assent, and if he did not assent within twenty days, the parliament might declare his neglect, and the bills should then become law notwithstanding." Cromwell must have been well assured of his influence in the legislative body, ere he assented to the introduction of a clause like this. He was declared to be lord protector

* See ante.

for life, and, on his demise, the council of state were to appoint a successor.

One of the most obvious reflections upon this remarkable instrument is, that it was made to serve the personal ambition of Cromwell. It secured to him the sovereign power until his death, but on that event it was evident that the government of the nation would be again dissolved.

R. E.

Will you give us some account of the government of Oliver Cromwell?

SIR R. E.

Strictly speaking, the history of the protectorate forms no part of our plan, and I do not feel inclined to dwell upon a period of our annals, the contemplation of which always fills me with regret. It is a painful and discouraging task to trace the progress of the struggle for freedom to its disastrous results, and to mark how vainly the blood of wise and virtuous men has been shed. I shall, therefore, pass over the despotic government of Cromwell, who, whatever may be the reputation and fame which he acquired for this country abroad, ruled it at home with a sceptre of iron. In the height of his supremacy, he manifested the most insolent disregard for the laws, whenever they obstructed the course of his ambition, nor did he hesitate to adopt the most arbitrary measures, when his security or his pro-

jects required them. But the most fatal consequence of his government was, that it induced a desire even for the unconditional restoration of the exiled sovereign; a desire so vehement, that though the king himself was probably prepared to return, upon conditions, he was yet restored to his throne without any adequate security against the recurrence of those grievances which had cost the country so much blood.

Having thus sketched, though imperfectly, the constitutional history of that great struggle, which its noble historian, has termed "the grand rebellion," I cannot dismiss the subject without endeavouring to impress upon your minds the proper view in which it ought to be regarded. That the measures pursued by the Long Parliament, previously to the raising of the king's standard at Nottingham, were just and necessary, cannot for a moment be questioned by any impartial enquirer into our history. The sole tendency of those measures, was to circumscribe, within its constitutional limits, the obnoxious prerogative claimed by the crown, and exercised in so many instances to the terror and ruin of the subject. So, also, in the armed resistance to which, after that period, the commons resorted, in support of the great principles of freedom which they professed, I can discover nothing but the exertion of that right which the constitution recognises in the people, of asserting, in the last extremity, their own inherent liberties

against the outrages of the crown. The struggle thus commenced, the people were justified in continuing to a successful termination; until they had the power of dictating to the king such terms as might consist with the full security of all their rights and privileges. Constitutionally speaking, further than this they could not go, for if they aimed to alter the frame of government, the constitution, of course, was at an end. I admit the power and the right of the people to make such a change, but I feel fully persuaded that neither at this nor at any other period of our history has the nation been prepared, or willing to abandon that form of limited monarchy, which appears so agreeable to the prejudices and inclinations of Englishmen. Not only, then, in a constitutional point of view, but also upon more extended principles, it was the duty of the predominant and successful party to have settled the wavering constitution, with a due regard to its ancient character, upon a firm and lasting foundation. Though the commonwealth's men might be of opinion, that a republic was the best form of government, though Cromwell, and Ireton, and Vane, and Marten, might, in all purity of conscience, have intended, in making the change, the liberty and happiness of the nation, yet by whom were they commissioned to select a form of government, and by what authority did they undertake to express the collected wishes of the people? How imper-

fectly these men and their companions represented the sense of the nation, appears by the unsuccessful efforts which they made to establish the system to which they were so warmly devoted, efforts which issued, as might have been expected, in the erection of an arbitrary authority. Had the sense of the country been honestly collected, there is little doubt that it would have called for the restoration of monarchy, with such limitations and guards as the liberties of the people required. It would, perhaps, be a difficult task, to point out the precise period at which the triumphant party might have proceeded with safety to such a settlement of the nation; but that a period did exist, when a measure like this, brought forwards with sincerity, temper, and discretion, would have been successful, I cannot doubt. It might, perhaps, have been necessary to have removed the crown from the brows of Charles to those of some other of his family, as in the case of James II.; and had this been done, there seems to be no reason why all the benefits which this country derived from the revolution of 1688, might not have been secured to it forty years earlier, and it might thus have escaped at once from the military sceptre of Cromwell, and from the disgraceful servitude of the two succeeding reigns. But, with a visionary republic before their eyes, and in their hearts, the great leaders of the army, like the Girondists of France, attempted to work the miracle of imposing

upon a vast nation, a form of government for which they were unfitted, and thus sacrificed, at the shrine of imaginary excellence, the real benefits and blessings which their hands might have bestowed upon their country.

CONVERSATION IX.

HISTORICAL SKETCH. — CHARLES II.

CHARLES II. — The restoration. — No limitations of the prerogative. — State of the nation. — Settlement of the revenue. — Abolition of feudal tenures. — Courts of justice. — Act for licensing the press. — Corporation act. — Principle of the test and corporation acts. — Declaration of indulgence. — Dispensing power. — Second declaration of indulgence. — Shutting up of the exchequer. — Popish plot. — Bill of exclusion. — Freedom of elections invaded. — Modes of raising money — benevolence. — Quo warrantos. — Parliament dissolved. — Character of the four last years of Charles's reign. — Progress of free opinions. — Beneficial statutes. — Habeas corpus act. — Assumed perfection of the constitution. — Standing army.

SIR R. E.

THE return of the king being demanded by those who were most able to accomplish the change, and, indeed, by the people at large, it became the duty of all the friends of freedom, to provide, as far as lay in their power, that so favourable an opportunity should not be lost, for ascertaining with precision, and confining within reasonable boundaries, the extent of the royal prerogative. The pro-

priety and necessity of such a measure became afterwards sufficiently visible in the misgovernment of the two succeeding reigns, though we are told by Hume, that "had the parliament, before restoring the king, insisted on any farther limitations than those which the constitution imposed, besides the danger of reviving former quarrels amongst parties, it would seem that their precautions had been entirely superfluous," since, as he argues, the crown, by reason of its slender and precarious revenue, was still in effect totally dependent.

R. E.

Surely this argument goes to prove, that all the great changes which were effected at the revolution in 1688 were also superfluous.

SIR R. E.

It does so; but the historian's reasoning is totally erroneous. Poverty was not sufficient to check the arbitrary notions of the newly-restored monarch, but, on the contrary, plunged him into still more ruinous courses, and drove him to the disgraceful expedient of becoming a pensioner to France. Had his prerogative been accurately marked out, and his purse been well furnished, the reign of Charles II. would, probably, have been peaceful and happy. On this point I wholly coincide with Burnet, who asserts, that "to the king's coming in without conditions may be well imputed all the errors of his reign."

H. E.

It is, I think, no slight testimony in favour of your view of the subject, that it was supported by one of the wisest and most honest men of the age, Sir Matthew Hale, then a member of the convention, who moved that a committee might be appointed to look into the propositions that had been made, and the concessions that had been offered by the late king during the war, particularly at the treaty of Newport, that from thence they might deduce such propositions as they should think fit to be sent over to the king.

SIR R. E.

The motion, however, fell to the ground, and the king was restored unconditionally, so that, in point of theory, the constitution was reduced to the state in which it stood before the death of Charles I. Since that period, nevertheless, a change had been effected in public opinion, which rendered the situation of Charles II. very different from that of his father. However fatigued and disgusted the people had become with the disorders and extravagancies to which the great civil contest had given rise, they had still profited by the deep political lessons it had taught them. In the first effervescence of their joy, indeed, it seemed that the nation knew not how to refuse the least wish of their sovereign; and it was little to their credit that they outstripped him in their eagerness

to shed the blood of those who had been instrumental in the death of his father. One of the first measures of the new reign was an act of indemnity and oblivion, which was quickly followed by a settlement of the revenue, whereby the sum of 1,200,000*l.* *per annum* was secured to the crown, a sum far greater than any former monarch had ever enjoyed. A very important alteration was at the same time effected, which had been long called for by the change in the state of society, and the improved notions with regard to the judicial policy of the country. The military tenure by knight service, with all its oppressive accompaniments of wardships, aids, and liveries, was abolished *; and in lieu of the profits arising from the court of wards, the moiety of a perpetual excise upon certain articles was settled by parliament upon the crown, the ancient exaction of purveyance being at the same time abandoned by the king, in consideration of the sum thus granted. Not only did this change prevent the renewal of the oppressive practice adopted by Charles I., of compelling those persons who possessed knight's fees, to assume the honour of knighthood, but by freeing a great part of the landed property of the kingdom from restraint of alienation, and the vexatious burthens imposed upon it, contributed very much to the general prosperity of the country.

* Stat. 12. Car. II. c. 24.

R. E.

This, at all events, was a measure creditable to the new government. And, if I remember correctly, the arrangements adopted in filling the seats of justice were no less so.

H. E.

Yes; Clarendon had great merit in that affair. By his efforts men of character and ability were raised to the highest posts in the law; and, as he tells us, "there appeared sooner than was thought possible, a general settlement of the civil justice of the kingdom, so that no man complained without remedy, and every man dwelt again under the shadow of his own vine, without any complaint of injustice and oppression." * Amongst others, Sir Matthew Hale was promoted, being appointed chief baron of the exchequer, on which occasion Clarendon "expressed his esteem of him in a very singular manner, telling him, amongst other things, that if the king could have found out an honester and fitter man for that employment, he would not have advanced him to it, and that he had, therefore, preferred him, because he knew none that deserved it so well." †

SIR R. E.

It would have been fortunate for his majesty, had he continued to act upon such principles, but

* Life of Clarendon, vol. ii. p. 43.
† Burnet's Life of Hale, p. 26.

the time came when the qualities which raised Hale to the bench ensured the disgrace of his successors. While the tide of popularity ran so strongly in his favour, Charles could afford to let the course of justice run free. Parliament appeared to be willing to concur in every measure calculated to restore the regal power to its former splendour. An act to compel the licensing of books was passed (13 & 14 Car. II. c. 33.), in order to restrain the liberty of the press; and for the purpose of promoting the desirable doctrine of non-resistance, the celebrated corporation act was passed, by which all magistrates were compelled to declare their belief, that it was not lawful, *upon any pretence whatever*, to take up arms against the king. In one respect this statute, indeed, was doubtless in opposition to the king's wishes, in so far as it operated to exclude his catholic subjects from bearing office. This, together with the passing of the act of uniformity, gave rise to an unconstitutional attempt on the part of the crown, which I shall shortly proceed to detail to you.

R. E.

I should like, before you proceed further, to hear your opinion respecting the policy of the test and corporation acts, more especially as those measues are at the present day so frequent a subject of discussion.

SIR R. E.

With regard to the injustice and inexpediency

in general, of excluding men from offices on account of their religious opinions, I trust you are too well acquainted with my sentiments to require me now to state them. Had the test and corporation acts only involved this question, I should at once denominate them unjust and oppressive; but there were other considerations connected with them. The Stuarts mainly relied upon the catholics for assistance in promoting their arbitrary and unconstitutional schemes, and, therefore, a measure which tended to depress that body, must be so far regarded as desirable. However, the danger which must occur in the application of a principle like this, is a sufficient reason for its rejection. It has been urged in our own times, with how much injustice, in point of fact, I need not say, against both the catholics and the dissenters. "You say the catholics were properly excluded," argue the enemies of emancipation, "in the time of Charles II., because their political principles were dangerous to the state. We say, the danger still exists, and we still exclude them; not because they believe in transubstantiation, and practise auricular confession, but because their principles are adverse to our constitution in church and state, as by law established." I believe, therefore, it is safer to lay it down as a general rule, that in no instance ought religious opinions to be made the test of political rights.

R. E.

I suppose Charles's parliament had no political motives in passing the corporation act,—I mean, that they had no intention of obstructing the arbitrary designs of the king.

SIR R. E.

I believe none whatever. They were governed by a bigotted aversion to popery. The king, desirous at once of softening the rigor of the new laws which pressed so heavily upon the catholics, and at the same time of exercising a prerogative which had been much disputed, issued a declaration, in which he stated, "that he should make it his special care, so far as in him lay, without invading the freedom of parliament, to incline their wisdom next approaching sessions to concur with him in making some such act for that purpose as might enable him to exercise, with a more universal satisfaction, *that power of dispensing, which he conceived to be inherent in him.*" Although the king's ostensible object was to afford relief to the consciences of the presbyterians and other dissenters, there is little doubt that the measure was principally designed to assist the catholics. Parliament, dreading this result, remonstrated against the proposed indulgence, and thus the great question, as to the dispensing power, did not, at this time, come into debate.

R. E.

But was not the attempt renewed by Charles at a later period?

SIR R. E.

It was. In the year 1672, another declaration was issued, in which his majesty expressed his will and pleasure "that the execution of all, and all manner of penal laws in matters ecclesiastical, be immediately suspended." This was a manifest assumption of a legislative power in his own person, and, as I shall hereafter endeavour to prove to you, was unconstitutional, though not without a semblance of precedents to support it to a certain extent.

H. E.

I think the chancellor, Sir Orlando Bridgman, had the honesty to refuse putting the great seal to this illegal declaration. *

SIR R. E.

He had, and was in consequence dismissed, while Lord Shaftesbury, who was less scrupulous, was substituted in his place, — The new indulgence, in the end, had no better fortune than its predecessor. The house of commons opposed it with such firmness †, that the king, although he had declared his positive determination to support the measure, was ultimately compelled to yield,

* Burnet's own Times, vol. ii. p. 524. Life of Lord Guilford, vol. i. p. 168.

† See Grey's Deb. vol. ii. p. 13.

and with his own hands tore the seal from the declaration. About this period also Charles exhibited another instance of his disregard, not only of the principles of the constitution, but of those rules which honour and honesty dictate. Being pressed by the necessities of his exchequer, he had borrowed from certain bankers of London a considerable sum of money, for which he engaged to pay them interest at the rate of eight per cent. On the eve of a war with Holland, the payment of this interest was found by his majesty to be extremely burthensome, and on the advice of Lord Shaftesbury, as it is said, (though some doubt appears to exist as to the true author of the nefarious scheme,) it was resolved to stop these payments, a measure which has been designated by our historians "the shutting up of the exchequer." The bankers were, of course, compelled to suspend their payments; and all men regarded with distrust and apprehension the government which was thus ready to sell its honour and its credit under the pressure of necessities wilfully imposed upon itself. But we must now turn our eyes awhile from the errors of the court, to that most extraordinary state-riddle, known by the name of the Popish Plot, which has tried the patience and triumphed over the ingenuity of the most acute and laborious enquirers into our history. The despotic influence which the plot exercised over all ranks of people, and the strong light which it

throws upon the character of the times, render some examination of it by us absolutely indispensable. You have not, I suppose, forgotten the leading facts of this mysterious affair, and I shall not, therefore, stay to repeat them. It will be sufficient for us to trace it in its effects upon the government and the people.

R. E.

Let me ask you, before you proceed further, your opinion as to the truth of the plot.

SIR R. E.

I really hardly know what answer to give you. That some plot existed I have no doubt; that is to say, I believe that a design, more or less matured, had been formed by the more zealous catholics at home and abroad to procure the re-establishment of their faith in England; but that the popish plot, as developed in the evidence of Oates, of Bedloe, and of Dangerfield, had ever a being, I cannot persuade myself for a moment to believe. Dryden has told us, that

"Some truth there was, but dash'd and brew'd with lies,"

which is indeed all that, on a careful review of the transaction, I feel inclined to say.

In a political point of view, the history of the popish plot is most curious, as a manifest exhibition of that supreme and sovereign power, before which every other authority, however great and imperious, is compelled to bend. I mean the

power of public opinion. The people at large had become infected with unconquerable fears of slaughters and massacres, to be perpetrated by the papists; and so strongly where they possessed with this sentiment, (inflamed by the perjuries of the infamous plot-witnesses,) that there existed no authority in the kingdom sufficiently powerful to check the violent and bloody course into which the nation plunged. The king, who certainly did not credit the plot, dared not hazard his crown by stopping the effusion of blood, and extending the prerogative of mercy to men whom, in his heart, he believed to be innocent. The parliament was carried away by the same enthusiastic panic terrors which filled the bosoms of the people, and even the bulwarks of the law, which ought to have arrested the course of injustice, were borne with the stream which swept the whole nation along. Justice, humanity, and common sense, seemed all abandoned. The most obvious falsehoods, the most preposterous fictions, were received with implicit belief, and England, in short, exhibited the spectacle of a grand national hallucination. Amongst other important results, the popish plot prepared the way, by the animosity which it inspired towards all professing the catholic faith, for the celebrated bill of exclusion to incapacitate James II., then Duke of York, from succeeding to the crown; a measure of which the policy and legality have been much canvassed. With regard

to the power of the legislature to alter the succession of the crown, no doubt existed; it was one of the first principles of the constitution, distinctly recognized by a statute of Elizabeth, which enacted, that all persons who denied the authority of the two houses of parliament, with the consent of the king, to direct the succession of the crown, should be guilty of high treason. Of the justice of excluding James from the throne, upon the ground of religious sentiments merely, more doubt may exist. It was to punish and incapacitate him for his opinions only, an act which it is exceedingly difficult to justify upon sound principles. On the other hand, the imminent peril in which the country was placed, in consequence of the prevalence of catholicism, intermingled, as it at that time was, with political sentiments of a very dangerous tendency, may seem to render this case an exception from the general rule, and it was in this view, no doubt, that the measure was at the time supported by Lord Russell, and has been in our own days justified by Mr. Fox. Perhaps the best ground upon which the bill of exclusion can be defended, is that upon which it was placed by Sir William Jones, one of the most eminent lawyers of that period, and a strenuous supporter of the bill: "Lastly, he said the duke was not excluded for his religion, but for his incapacity of governing according to the English laws, which incapacity, whether it proceed from religion or

any other cause, is all one to them."* In order to defeat the bill, which was almost as obnoxious to Charles as to his brother, a variety of restrictions were proposed by the king to be imposed on the accession of James; but the proposition was rejected by the house of commons, and the bill of exclusion was passed and carried up to the lords by Lord Russell, amid loud acclamations. The court party, however, was stronger in the upper house, and after a vigorous contest, the bill was thrown out upon the first reading.

R. E.

The temper of the commons must have greatly changed, before they could thus boldly and obstinately oppose the court.

SIR R. E.

It had indeed suffered a great alteration since the period of Charles's return, an alteration so obvious, that even the king perceived how impossible it was for him to persevere in the course which he had so long pursued, without endangering his crown; and accordingly he determined, either to procure a parliament more obedient to his wishes, or by obtaining supplies of money from France, at once to remove the necessity of calling together the representatives of the nation. Soon after his restoration, Charles had tried the experiment which had proved so fatal to his father,

* Life of James II. vol. i. p. 607.

of endeavouring to raise supplies without the consent of his parliament; but the measure was so unsuccessful that it was speedily abandoned. "The benevolence," says Pepys in his Diary under the date of 31st Aug. 1661, "proves so little, and an occasion of so much discontent, that it had better it had never been set up."

H. E.

I remember an anecdote, which the compilers of the parliamentary history * have preserved relative to this benevolence, which will perhaps amuse you. "The collectors came to the house of an old lady of the name of Wakefield, who then lived in the town of Pomfret, and having told her their errand, *Alas! Alas!* said she, *a poor king indeed, to go a begging the first year of his reign! but stay, I will bestow something on him;* and telling them out ten broad pieces — *Here!* said she, *take these.* The officers were going away very thankful for what they had got: *Hold!* says the old lady, *here are ten more to bear the charges of the other, and then, perhaps, some of them may reach him.*"

SIR R. E.

She was as loyal an old lady as Edward the Fourth's friend, whom you may remember. I am afraid, however, that Charles found few of his subjects so liberal, and it therefore became necessary to procure a parliament agreeable to his

* Parl. Hist. vol. ii. p. 364.

wishes, to effect which he resolved to proceed against various boroughs, which were supposed to have forfeited their charters, so that the crown, on regranting the charters, might make convenient arrangements with regard to the election of the members of parliament for such boroughs, who would thus be, in fact, the mere nominees of the government. "We must own," says a court author of the time, "that the crown had need of a better interest than it had in the choice of members to maintain a due balance; that an adverse party might not carry every thing in their model against the crown, as was most notoriously the case in the Oxford and Westminister parliaments." * The law officers of the crown were accordingly directed to proceed by writ of *quo warranto* against several corporations, for having forfeited their charters; and, amongst others, against the corporation of London. The most frivolous infractions of their rules, were insisted upon as forfeitures. Thus the charter of Oxford was attacked, because there were five aldermen instead of four, and because Stephen Kebble, the town clerk, had signed himself the king's clerk without his majesty's permission. † The particulars of these transactions I need not enter into; you will find them in the histories of the time; and for their legality, I may refer you to the State Trials, where you will find

* North's Examen, p. 626.
† Dalrymple's Memoirs, p. 75.

the great case of the *quo warranto* against the city of London; which, to use the language of Fox, "seemed to hold out for a certain time like a strong fortress in a conquered country." I only refer to these iniquitous measures in order to exhibit the temper of the court; and to prove the good-will with which it worked, especially towards the latter end of this reign, to establish an arbitrary authority. Even supposing that the charters had been legally forfeited, which in the majority of instances was not I believe the case, yet the attempt to impose new charters, securing to the crown the nomination of members, was a most unconstitutional and oppressive measure.

R. E.

The court did not, I think, derive much advantage from this illegal attempt.

SIR R. E.

It did not. The parliament, which had so vigorously supported the bill of exclusion, was dissolved; but the succeeding one, which Charles was compelled by his necessities to call together, was by no means more compliant than that which preceded it; and the Oxford parliament, as it was termed, was dissolved with a precipitation which proved the jealousy with which its proceedings were viewed by the court. The *breaking* of this parliament was regarded by the royalists as a signal triumph; and from this period, till the death

of Charles, the high court principles maintained a decided ascendency.

H. E.

Might you not say, that they maintained their ascendency throughout the whole of his reign?

SIR R. E.

Perhaps you might; but during the few last years of his life, Charles met with much less opposition than he experienced at an earlier period. The discovery of the Rye-house plot, and the execution of Russell and Sidney, "names that will, it is hoped, be for ever dear to every English heart," seemed to render him triumphant over all his enemies. In reviewing the history of his reign you will find, that, notwithstanding the repeated checks which the principles of arbitrary government received from the vigorous resistance of the house of commons in matters of religion, and notwithstanding some very salutary alterations in the laws, the court had made a decided progress. After a long contest with the commons, the crown had triumphed. A league had been formed with the king of France to supply those pecuniary wants, which alone rendered the calling together of a parliament necessary; the judges had been converted into mere instruments for inflicting the royal vengeance; and the integrity of parliament itself had received a severe injury by the adoption of the infamous *quo warranto* system. Had

Charles possessed that zeal and activity in the cause of arbitrary government which his brother afterwards displayed, the liberties of the nation would, indeed, have been placed in the utmost jeopardy. Fortunately, however, he wanted the energy to make himself a tyrant. "The king of England," says Barillon, the French ambassador, "still wavers upon carrying things to extremity; his humour is very repugnant to the design of changing the government. He is, nevertheless, drawn along by the Duke of York, and the high treasurer; but at the bottom, he would rather choose that peace should leave him in a situation to remain in quiet and re-establish his affairs; that is to say, a good revenue. I do not believe that he cares much for being more absolute than he is." *

On the other hand, the principles of free government appear to have made, during the same period, but little progress in the estimation of the people. The opposition which the crown met with in the house of commons had its origin chiefly in religious feelings, while the nation at large viewed the proceedings of the court with apathy, or rewarded them with approbation. On the discovery of the Rye-house plot, numerous addresses were presented to the king, many of which breathed the language of the most passive obedience; and on the very day in which Russell perished on the scaffold, the university of Oxford

* Dalrymple, Mem. vol. ii. p. 174, dated 18th April, 1678.

passed a decree condemning certain doctrines which, even according to Hume, were "the only tenets on which liberty and a free constitution can be founded." At the same time, notwithstanding this ascendency of the prerogative, the people were daily becoming more powerful; and although they seldom exerted their strength in opposing the arbitrary pretensions of the crown, yet they manifested it in the zeal and resolution with which they resisted every attempt to promote, or favour the catholic faith. Arbitrary as Charles had rendered himself, or rather, as his ministers had rendered him, he did not dare to pardon a single criminal convicted of a participation in the popish plot. The cause of this increasing influence in the people must undoubtedly be attributed to the superior intelligence which was beginning to be diffused amongst the nation at large, and to that awakening of the public mind which always follows a great revolution.

Hitherto we have chiefly traced the progress of misgovernment during this inglorious reign; we must now turn our attention to the brighter side of the picture. It has been said, that the reign of Charles II. was the era of good laws and of bad government, and undoubtedly many excellent enactments are to be found upon the statute-book of that period. The destruction of the military tenures we have already noticed. To this must be added, the abolition of the *de heretico com-*

burendo; several wholesome statutes affecting the administration of the law; and, lastly, that noble provision for freedom, the *habeas corpus* act.*

It is certainly somewhat singular that this stoutest bulwark of our liberties should have been repaired and renewed during a reign so profligate and unprincipled as that of Charles II. You may remember that, in the petition of right, a provision was made against the illegal imprisonment of the subject, and that afterwards it was enacted by a statute passed 16 Charles 1. c. 10. that the writ of *habeas corpus* should be granted in cases of commitment by the king or privy council; these provisions, however, were found insufficient, and a new law was consequently introduced, by which the personal liberty of the subject was at length adequately secured. The principal provisions of this celebrated act are, that the prisoner, unless committed for treason or felony, shall be brought before the court or the judge granting the writ *immediately*; and that, if committed for treason or felony expressed in the warrant, he shall be brought to trial the next term or session. The execution of the statute is enforced by heavy penalties.

R. E.

How did Charles like a law which must have thrown so great an obstacle in the way of any arbitrary designs?

* 31 Car. 2. c. 2.

SIR R. E.

He did *not* like it; nor was it a greater favourite with his brother. Barillon, the French ambassador, in a letter to his court, says, "The deceased king of England, and the present one, have often said to me that a government could not subsist with such a law;" and again — "He (James) added that his design was to make the parliament revoke the test act and the *habeas corpus* act; one of which was the destruction of the catholic religion, and the other of the royal authority."* It was probably the known disposition of the king on the subject which gave rise to the great opposition that the act met with in the lords; of which Burnet has preserved a curious anecdote. "It was carried by an odd artifice in the house of lords: Lord Grey and Lord Norris were named to be the tellers; Lord Norris, being a man subject to the vapours, was not at all times attentive to what he was doing; so a very fat lord coming in, Lord Grey counted him for ten, as a jest, at first; but seeing that Lord Norris had not observed it, he went on with this misreckoning of ten; so it was reported to the house, and declared, that they who were for the bill were the majority; though it, indeed, went on the other side; and by this means the bill passed." †

* Dalrymple, Appendix, p. 171.
† Burnet's own Times, vol. ii. p. 842.

H. E.

Blackstone, I think, tells us, that the constitution had arrived at its full vigour, and that the true balance between liberty and prerogative was happily established by *law* in the reign of King Charles the second. *

SIR R. E.

That some progress had been made in defining the limits of the prerogative during that period, I admit; but that the true balance between liberty and prerogative was established by law, I must deny. Was the great and hazardous question of the dispensing power put to rest as it ought to have been, and as it afterwards was at the Revolution, and was the tenure of the judges rendered independent of the royal pleasure? While such defects as these remained to be supplied, the prerogative, believe me, was too heavy. The Revolution, which is adduced by Blackstone to prove that the subject enjoyed "as large a portion of civil liberty as is consistent with a state of society, and sufficient power to assert and preserve that liberty," appears to me to be the strongest proof that the balance between liberty and prerogative was not established. Had the rights of the crown and the subject been clearly defined and understood, it is impossible that James could for a moment have contemplated the extravagant measures which led to his ruin.

* Com. vol. iv. p. 439.

H. E.

Surely the records of our courts of justice during the reign of Charles II. sufficiently prove that too much weight was thrown into the scale of the prerogative. By *law* the king was entitled to remove any of the judges who displeased him, and Charles exercised this privilege freely. When Saunders, who had been employed by the crown to prepare all the proceedings in the case of the *quo warranto* against the city of London, was placed at the head of the king's bench, to decide the very question which he had advised upon in his capacity of counsel, the appointment was undoubtedly a legal one, and yet, who will say that it was not grossly improper?

SIR R. E.

I am indeed far from thinking that our constitution had obtained, at that period, the theoretic perfection attributed to it by Blackstone, and this opinion is strengthened by observing the practical misgovernment which at that time prevailed.

R. E.

In reading the histories of these times, I have sometimes been surprised that Charles did not attempt the establishment of a standing army, which might have enabled him to govern according to his pleasure.

SIR R. E.

The scheme was in contemplation, and indeed

was in part carried into execution, but the jealousy of the commons prevented its completion. So early as the year 1661, Pepys tells us *, that Clarendon "did project the raising of an army forthwith, besides the constant militia, thinking to make the Duke of York general thereof; but the house did in very open terms say, they were too wise to be fooled again into another army." But though Charles was unsuccessful in this attempt to establish a standing army, he in fact led the way to that practice, for on the disbanding of the troops soon after the Restoration, two regiments were retained in his service, under the denomination of guards; which, in 1662, amounted, we are told, to about 5000 men. In consequence of the second Dutch war, Charles raised an army of 12,000 men, who were kept encamped on Blackheath, till becoming discontented for want of pay, they were disbanded. Afterwards, in contemplation of a war with France, the king raised a force of upwards of 20,000 men; but the popish plot breaking out soon afterwards, parliament grew jealous of the army, and it was disbanded. †

* Diary, vol. i. p. 128. † Harris's Charles II. p. 294.

CONVERSATION X.

HISTORICAL SKETCH. — JAMES II.

JAMES II. — His arbitrary principles. — His professions. — His pension from France. — Barillon. — Levying of tonnage and poundage without assent of parliament. — Management of elections. — Monmouth's rebellion. — Cruelties of Jeffries. — Standing army. — Temper of the house of commons. — Dissolution of parliament. — The king attempts to gain over the judges. — Sir Edward Haler's case. — Dispensing powers. — Court of high commission re-established. — Declaration of liberty of conscience. — Indulgence published in Scotland. — In England. — The church of England alienated. — The dissenters address the king. — James attempts to gain over the members of parliament. — Case of the seven bishops. — Approach of the Revolution. — Prince of Orange's convention. — The settlement of the nation. — Principle of the Revolution. — Blackstone's observations. — Settlement of the crown upon William and Mary. — Bill of rights. — Observations on the progress of the constitution.

SIR R. E.

You must give me all your attention to-day, for we have arrived at a period which may be termed the crisis of our constitutional history.

R. E.

The Revolution of 1688?

SIR R. E.

The same. But we must trace with care and diligence the causes which led more immediately to that most happy event; and, in the first place, it will be necessary to develope the views and feelings with which James II. ascended the throne. We have seen in our review of the last reign, the pertinacity with which James adhered to his religious principles, and the dangers to which that pertinacity exposed him; but until the death of his brother, the true character of his political sentiments was little known, although a general suspicion was entertained that he was inclined to arbitrary measures. It was only upon his assuming the crown, that men made the fearful discovery, that the untiring obstinacy, and uncompromising bigotry, which marked his religious faith, distinguished also his political creed. It has been made the subject of some dispute, whether James was incited to the fatal steps which led to his ruin by religious or by political motives. The majority of our historians have supposed him to have been carried away by the former, while Mr. Fox, and his vindicator Serjeant Heywood, have maintained that he was actuated by the latter. It is obvious, however, that a dispute like this can never be terminated in a satisfactory manner. To effect the accomplishment of his wishes, whether the object of them was the triumph of his faith, or the extension of his prerogative, the same means were requisite,

and we have therefore little evidence by which we may fathom the secret motives which governed him.

Never did any of our princes ascend the throne more peaceably than James II. The tide of popular feeling appeared to have subsided into an almost perfect calm. The whigs, who had lost some of their noblest and ablest leaders, were terrified into a submissive silence; even the popish plot had lost its power of excitement, and was disregarded or disbelieved. * Under such circumstances, a sovereign of common prudence would have found the throne a secure and honourable seat; and even James, on his first address to the privy council, betrayed none of those arbitrary intentions which immediately afterwards marked his conduct. He spoke of clemency and tenderness to his people; he acknowledged that the laws of England were sufficient *to make the king as great a monarch as he could wish*; and he promised to defend the church of England, and to go as far as any man in maintaining the just rights and liberties of the nation. †

In what manner these royal promises were observed, you know; but it will be proper for us to notice with more particularity the specific attempts which James made to destroy those liberties which he thus solemnly professed to guard.

* Lord Lonsdale's Memoirs.
† Kennett, vol. iii. p. 420. Fox, 75.

One of the first acts of his reign was to strengthen his good correspondence with France, and to beg for a continuance of that infamous pension which had been granted to his brother. The degrading subserviency which he manifested, in his interviews with Barillon, the French ambassador, on this subject, proves him to have been totally unfit to rule over a free and generous people. We will refer to Barillon's letters. Bring me Mr. Fox's history, — now turn to the Appendix, in which it is the fourth letter, — read it, — do you mark its servile spirit?

H. E.

It is, indeed, written in a most unkingly style, — and see! in another letter, his conduct really appears even more contemptible. On Barillon telling him, that Louis was about to send him the inconsiderable sum of 500,000 livres, James, *with tears in his eyes*, said "it is peculiar to the king your master to act in a way so noble, and so full of goodness towards me."

SIR R. E.

Now, turn to Dalrymple, and you will see upon what terms these monies were furnished. A sum of money was directed by Louis to be paid, "when the parliament was dissolved, and the king of England reduced to make his subjects submit by force." * Well might James exclaim, that he had

* Dalrymple, Appendix.

a *French heart!* — but shut the book, and let us follow him in his more bold and open attacks upon the constitution.

You must both of you have observed, in the course of our enquiries, that if there existed one firm and settled principle in the governments of this country, it was undoubtedly that which recognises the right of the people to be taxed only with the consent of their representatives. That the principle had been infringed is admitted. What maxim of government has ever been inviolably observed? But distrust and resentment on the part of the subject, and retreat and repentance on the part of the crown, had ever followed the unwise attempt. James, however, remained uninstructed by the lesson, and, before the summoning of a parliament, ventured upon a measure which had endangered the stability of his grandfather's throne, and had cost his father his head.

The tonnage, poundage, and other duties, had been settled upon Charles II. for his life only, and, of course, ceased upon his death; and James, although he had determined to call a parliament, resolved not to lose this happy occasion of bringing his arbitrary principles into play. By the advice of Jefferies, the lord chief justice, a proclamation was issued, commanding the officers to collect the revenue as formerly; and so abject at that time was the public spirit of the nation, that no murmurs were breathed against this most

illegal and dangerous proceeding, nor did the commons, on their assembling, take any notice of so deadly a blow upon their first and most undoubted prerogative. Bring me James's own Memoirs, and let us see the account which he has given of the transaction. * Observe what he says, — "the king made no mention of this claim, by virtue of his prerogative, nor did the parliament find fault with him for collecting it as he had done."

R. E.

Was there no one like Hampden, to question so illegal a stretch of power?

SIR R. E.

Not one. Burnet tells us, that none would venture on so bold a thing. † The king, elated by his success, was resolved to continue the levying of the taxes, be the consequences what they might ‡, and the impunity which he met with on this occasion tempted him to pursue, with redoubled eagerness, his fatal policy.

Amongst his first and most important attempts, was the procuring a parliament submissive to his wishes. This, as I have already shown you, was the grand object of the *quo warrantos*, issued in this and the preceding reign. No arts were ne-

* Vol. ii. p. 17. See also the Life of Lord-keeper North, vol. ii. p. 190.

† Own Times, vol. iii. p. 1066.

‡ Barillon's Letters, Fox's Appendix, p. 39.

glected by the court to procure the return of men sufficiently corrupt to forward its purposes. I remember having read in some of the memoir-writers of the day, a striking account of these elections.

R. E.

Perhaps you are thinking of the extract given from Narcissus Luttrell's "Historical Relation," in the notes to the State Trials.

SIR R. E.

Probably so; let us hear the passage to which you allude.

R. E.

"About this time, persons were very busy in elections of members of the house of commons, to serve in the ensuing parliament. Great tricks and practices were used to bring in men well affected to the king, and to keep out all those they call whigs or trimmers."

H. E.

Pray, stop a moment; and tell me, father, what is the exact meaning of the word *trimmer*, as used by the writers of that time, for I have only an imperfect notion of it.

SIR R. E.

In the political vocabulary of James II.'s reign, "a trimmer" signified a man who refused to go all lengths with the court, and who yet differed in

principle from the Whigs, or country party. Sometimes it was used to signify "a stout church of England Tory." Lord Halifax, who was reputed the head of the trimmers, has left "the character of a trimmer," to which I shall refer you for *his* explanation of the term.

H. E.

Now I remember my old friend the Lord-keeper North was called a trimmer, and I think your definition hits his character very fairly.—But go on.

R. E.

"At some places, as Bedford, &c., they chose at night, giving no notice of it; in other boroughs, as St. Albans, they have now regulated the electors by new charters, in putting the election into a selected number, when it was before by prescription in the inhabitants at large. In counties they adjourned the poll from one place to another, to weary the freeholders, refusing also to take the votes of excommunicated persons, and other dissenters: noblemen busying themselves with elections, getting the writs and precepts into their hands, and managing them as they pleased. The king commanding some to stand, and forbidding others, polling many of his servants at Westminster to carry an election; foul returns made in many places; and where gentlemen stood that

they called Whigs, they offered them all the trick and affronts imaginable." *

These corrupt and unconstitutional proceedings, struck terror into the hearts of all good men. "It is manifest," says Lord Lonsdale, "that the house of commons will retain nothing but the name; the virtue will be gone, when the king shall have the power of nominating all the citizens and burgesses." † The virtue, however, notwithstanding all the attempts to destroy it, was not wholly extinct. During their first session, indeed, the commons, in all respects, conformed themselves to the royal wishes; and it was not until their second meeting that they manifested any intention to enter into a contest with the prerogative. The defeat and execution of Monmouth and Argyle, in the mean time, gave confidence to the king's hopes; and the unspeakable cruelties which followed the suppression of Monmouth's rebellion, were doubtless thought by James to have inspired all hearts with a wholesome terror of resistance.

H. E.

I have just been reading the trial of Mrs. Lisle and the western rebels. The conduct of Jefferies on those trials was really appalling and awful. There was something so detestable and revolting

* State Trials, vol. x. p. 34. See also the Life of Lord-keeper North, vol. ii. p. 191.

† Memoirs, p. 6.

about the character of that man, that I can never think or speak of him without feeling my blood grow hot. He seems to have possessed every quality with which men are used to invest the Principle of Evil. Surely the employment of such a judge, not to speak of the encouragement and affection extended by James to him, is a stain which nothing can wash out.

SIR R. E.

It is so, indeed; but I shall call upon you speedily for a further account of him. In the meanwhile let us proceed with our immediate subject. On the meeting of parliament in November 1685, the king addressed them in a new and decided tone, and openly manifested a resolution to maintain a standing army, and to exercise the dispensing power of the crown in favour of the Roman Catholics. "I hope every body will be convinced," he observed, after alluding to Monmouth's rebellion, "that the militia, which have hitherto been so much depended on, is not sufficient for such occasions, and that there is nothing but a good force of well-disciplined troops in constant pay that can defend us from such as, either at home or abroad, are disposed to disturb us." He then adverted to the illegal employment of Roman Catholic officers in the army. "I think them now fit to be employed under me," he observed; "and I will deal plainly with you, that, having had the

benefit of their services in such time of need and danger, I will neither expose them to disgrace, nor myself to the want of them, if there should be another rebellion to make them necessary to me." * This was, indeed, dealing plainly; and the parliament were called upon to display an unconditional submission: but their religious scruples awakened feelings which their patriotism had failed to rouse, and they ventured, though in the most respectful terms, to remonstrate with James on this dangerous assumption of power. The address was ungraciously received by the king, and was answered, as we are told, with great violence of voice and gesture. On a motion in the commons (which however was not carried through) to take the royal answer into consideration, Mr. Coke, after a profound silence had been observed for some time, said, "I hope we are all Englishmen, and not to be frighted out of our duty by a few hard words;" a speech for which he was sent to the tower, while the house proceeded to make a liberal grant to the crown.

The proceedings in the house of lords were not more satisfactory to the king than those which had taken place in the commons; for although thanks were returned for the royal speech, yet, on the motion of the bishop of London, a day was appointed to take it into consideration. Before

* Chandler's Debates, vol. ii. p. 180.

that day arrived, James prorogued the parliament, which never again assembled during his reign.

R. E.

How very arbitrary and unconstitutional must have been the king's views, when even a parliament, chosen as this was, could not be depended upon to forward them!

H. E.

Burnet, I think, says, that his breaking with the parliament was a very happy thing for the nation, since it would have been difficult to find in all England 500 men so weak, so poor, and so devoted to the court. *

SIR R. E.

Weak and poor and devoted as they were, James could not trust them. He appears, indeed, to have been anxious to carry through his measures without their assistance; and soon after their prorogation, he hastened to give effect to his projects. His first resolution was to obtain an opinion from the judges in favour of his dispensing power. In what manner the bench was prepared for the reception of this doctrine, I shall ask Hugh to explain, as he has, I think, been lately making some enquiries into the judicial history of these times.

* Own Times, vol. iii. p. 1140.

H. E.

I will give you the best account in my power, though I am really ashamed of a narrative so disgraceful to the profession of which I am one time to be an unworthy member. At the period in question, the infamous Jefferies had been shortly before raised to the woolsack, on the death of the Lord-keeper Guilford, a man of arbitrary politics, but honest, according to the honesty of a resolute though not violent partisan. In place of Jefferies Sir Edward Herbert, who, while chief justice of Chester, had expressed a strong opinion in favour of the dispensing power, was made chief justice of the king's bench, a man of a slavish mind, and devotedly attached to the prerogative, but, according to Burnet *, virtuous, generous, and good-natured. Upon Herbert James knew he might well rely; but it was necessary, before any further proceedings were taken, to sound the other judges, and to ascertain how far they were inclined to sanction the illegal steps of the court. Their opinion was secretly demanded, and James met with more resistance than he probably expected. Several of the judges, amongst whom were Sir Thomas Jones, chief justice of the common pleas, Sir Job Charlton, one of the justices of the same court, and Montague, chief baron of the exchequer, all of them zealous lovers of the prerogative, were yet not sufficiently corrupt to countenance this

* Own Times, vol. iii. p. 1142.

new and extraordinary breach of the constitution. His majesty was pleased to tell Sir Thomas Jones that he would have twelve judges of his own opinion; upon which the chief justice, who, as Roger North tells us *, was "a gentleman of Welsh extraction, and apt to be warm," replied, that "he might probably find twelve judges of his opinion, but that he would scarce find twelve lawyers to be so." † In fact, however, the king was unable even to find twelve judges suited to his purpose, as I suppose we shall see when you give us an account of Sir Edward Hales's trial.

SIR R. E.

Which I shall now do. Sir Edward Hales, an unprincipled man ‡, but a favourite with the king, having been appointed a colonel in the army, and neglecting to take the oaths prescribed by the Test act, had incurred the penalties imposed by that statute. The king, anxious to procure a public exposition of the judges' opinion in favour of his dispensing power, selected the case of Sir Edward Hales, for the purpose of accomplishing that object, and Sir Edward's coachman was accordingly directed to sue his master for the amount of the penalties given by the act. Sir Edward pleaded the royal dispensation, empowering him to act *non obstante* the statute. Counsel were as-

* Examen.
† Kennet, vol. iii. p. 449. Coke's Detection, vol. ii. p. 435.
‡ Life of Lord Guilford, vol. ii. p. 327.

signed the coachman by the court to argue this matter of law, which they performed, says Burnet *, "with a most indecent coldness," as might have been anticipated in men who were arguing against their interest, and against the court. Notwithstanding the diligence which James had displayed in removing from the bench all who had entertained any doubts as to his prerogative, he could not succeed in obtaining an unanimous opinion. Powell, indeed, who hesitated at first, subsequently concurred with the majority; but Street,

"Amongst the faithless faithful only found;"

had the resolution to assert and maintain his opinion, that the king did not possess the power which he claimed. The judgment of the majority was delivered by Sir Edward Herbert, in the following words:

"1. That the kings of England are sovereign princes.

2. That the laws of England are the king's laws.

3. That therefore it is an inseparable prerogative in the kings of England to dispense with penal laws in particular cases, and upon particular necessary reasons.

4. That of those reasons, and those necessities, the king himself is sole judge; and then, which is consequent upon all,

* Own Times, vol. iii. p. 1143.

5. That this is not a trust invested in, or granted to the king by his people, but the ancient remains of the sovereign power and prerogative of the kings of England, which never yet was taken from them, nor can be."

You cannot fail to observe, that this decision, in principle, went far beyond the case which gave rise to it, and established a theory of government thoroughly absolute and despotic. From the position, that the laws of England are *the king's laws*, it follows, as a necessary consequence, that the sovereign may dispense with penal enactments, and by a deduction as close, it may be conceded from these premises that he may dispense with all other laws. If the laws are his, his too is the power to enforce them or not at his pleasure; and if, where the interests of the whole community are affected, the exercise of this power is legal, surely it must be so where only the property or the liberty of a single individual is concerned. Such are the doctrines which were doubtless intended, at a fitting opportunity, to be grounded upon this fatal judgment, had the ancient spirit of the English people been so far broken as to submit to such a thraldom.

The blow which appeared to be thus successfully struck against the liberties of the people, was quickly followed up by another equally decisive. James, who perceived that great opposition was to be apprehended from the clergy of the

established church to his favourite project of introducing the catholic faith, resolved to establish an ecclesiastical commission, invested with the jurisdiction and power which formerly appertained to the high commission court, which, as we have seen, was abolished in the year 1640, by a statute which forbade the erecting of any such court in future. In defiance of this enactment, James appointed a number of ecclesiastical commissioners, whom he invested with extraordinary powers; and to whose commission he appended the now formidable clause of *non obstante*, declaring them free to exercise their authority, notwithstanding any law or statute to the contrary. The infamous Jefferies was placed at the head of this illegal court, of which the archbishop of Canterbury, and the bishops of Durham and Rochester were also made members; but the archbishop refusing to act, the bishop of Chester was substituted in his place. For the character of these worthy prelates, I must refer you to their brother of Salisbury.

H. E.

I think, father, we must take Burnet's account of these persons *cum grano salis*. He is particularly severe upon the failings of his brethren. To be sure, his mention of the bishop of Durham is very characteristic. "Durham was lifted up with it, and said, Now his name would be recorded in history; and when some of his friends re-

presented to him the danger of acting in a court so illegally constituted, he said he could not live if he should lose the king's precious smiles; so low and so fawning was he!" *

SIR R. E.

The oppressive proceedings of this commission it is not our province to notice with particularity, and indeed you are already acquainted with them in the general histories of the time; but with regard to the illegality of the new jurisdiction, I must add a few words. By the statute of 16 Car. 1. c. 11. it is enacted, that no new court shall be erected which shall have the like power, jurisdiction, or authority, as the high commission court then had. By a subsequent statute, on the restoration, (13 Car. 2. c. 12.) it was declared, that the above act should not, and did not, take away any ordinary power or authority from any archbishop, bishop, &c.; but that they, exercising ecclesiastical jurisdiction, might proceed and exercise all manner of ecclesiastical jurisdiction, in as ample manner as they might have done before the passing of the act of Charles 1. Upon this statute, the king attempts to justify the erecting of the new commission †; but he suppresses all mention of the exception in the statute of Charles 2., which, while it repeals the act of 16 Charles 2., expressly excepts that clause

* Own Times, vol. iii. p. 1153.
† Life of James II. vol. ii. p. 89.

of it which forbids the erection of any new court of ecclesiastical commissioners. The erection of the new court was, therefore, clearly and indisputably illegal, and the conduct of the commissioners was such as was to be expected from men, who had been selected for their devoted submission to the royal wishes.

The success which had hitherto attended James's efforts now led him to adopt a measure, which had long lain near to his heart, — a declaration of liberty of conscience to all his subjects.

R. E.

Do you intend to rank this measure amongst the other acts of arbitrary power which James exercised? I should have thought that to declare liberty of conscience was certainly not the act of a despot.

SIR R. E.

It is natural to suppose so; but when we weigh the merit of any action, we must look to the circumstances under which it is accomplished, and the objects to which it is directed. The state of England at this period was such, that it was a matter of the highest importance to check the progress of those arbitrary principles and dangerous projects which were entertained by James and his confidential advisers. The design to effect the establishment of the catholic religion was so closely connected with the political views of the monarch,

and the means adopted by him to forward the former object were so openly unconstitutional, that, independently of all considerations as to the policy and justice of placing restrictions upon the catholics, it was esteemed the duty of every friend to his country to oppose a measure which, under happier circumstances, might have been hailed as a proof of the king's wisdom and honesty.

R. E.

I see the justice of what you say, and can well imagine, that the men who in the reign of James II. opposed the king with the most firmness, would, at the present day, be found amongst the warmest supporters of the catholics.

SIR R. E.

You are right; and they would act under the influence of the same principles applied to circumstances totally different. To extend the opposition offered to the court in James's time to the catholics of the nineteenth century, is as preposterous as to look for a Father Garnet in Dr. Poynter, or a Guy Faux in Mr. Charles Butler.

James having taken his resolution, lost no time in carrying it into effect. Scotland was chosen as the fittest place for the first promulgation of the new indulgence, from the tone which the parliament of that kingdom had adopted towards the king, which induced his majesty to expect an entire submission to his will. In the act for settling the ex-

cise, they had declared their abhorrence of all principles and positions which were contrary or derogatory to the king's "sacred, supreme, sovereign, and *absolute* power and authority," and they were now deservedly destined to feel the influence of that "absolute power" which they had thus slavishly acknowledged. "The king," says James himself, in a tone of sarcasm, which was really justified by the expressions of the Scotch parliament, "the king imagined, that if he exceeded the boundaries of his legal power in this, it was the parliament itself which led him astray; for what he did could never be said to go beyond an absolute power, which they had both allowed him, and sworn to maintain."* His majesty accordingly, by his sovereign power, prerogative royal, and absolute authority, suspended, stopped, and disabled all laws or acts of parliaments made, or exercised against any of his Roman Catholic subjects," and instead of the oath required by law, enjoined an oath by which it was declared to be unlawful for subjects, upon any pretence whatever, to rise in arms against the king, or any commissioned by him. It is certainly not wonderful that this measure created, to use James's own words†, "a jealousy of his majesty's aiming at arbitrary government;" but the submissive manner in which the council of Scotland received the indulgence, induced James

* Life of James II. vol. ii. p. 107.
† Ibid. p. 111.

to prosecute the same attempt in his English dominions.

On the 4th of April, 1687, the declaration of indulgence was promulgated in England. It was couched in rather more modest terms than those which had been employed in the Scottish declaration, but in substance it was the same.* The execution of all penal laws was thereby suspended for an indefinite period, and it was declared to be the royal will and pleasure, that the oaths commonly called the oaths of allegiance and supremacy should not in future be required to be taken.

H. E.

This must have been felt as a great relief by the dissenters, who had suffered so much in consequence of their religious scruples.

SIR R. E.

It was so; and they naturally enough, in the immediate joy which the indulgence inspired, forgot the real object at which it was aimed. Numerous addresses from various denominations of dissenters were poured in, while many corporations and other public bodies likewise approached the throne, with their congratulations on the occasion.

R. E.

Amongst the rest, Dalrymple†, I think, tells us, that there was an address from the cooks, who said,

* See it in Kennet, vol. iii. p. 487. † Memoirs, p. 169.

that "the declaration of indulgence resembled the Almighty's *manna*, which suited every man's *palate*, and that men's different *gustos* might as well be forced as their different apprehensions about religion."

SIR R. E.

The addresses were certainly very numerous, the appetite and taste of the court in that particular being well known, not only to the cooks, but to the rest of the country. The dissenters, however, lived to see their error. The members of the established church, even previously to the declaration of indulgence, had almost openly broken with the king. The affair of Magdalen College, the particulars of which I need not repeat to you, had totally alienated the affections of the churchmen, who perceived in this attempt the king's resolute determination, not only to sacrifice their doctrines, but also their property to their catholic rivals.

The indulgence was stated to be issued by virtue of the royal prerogative; but a clause was added, that the king "made no doubt of the concurrence of his two houses of parliament when he should think it convenient for them to meet." It appearing, however, that his majesty had made some miscalculation upon this point, the parliament was dissolved, with a view to the selection of a more compliant assembly. The conduct pursued by James upon this occasion proved how

totally corrupt were his principles of government. Orders were given to the lord-lieutenants of counties, and to the judges upon their circuits, to examine the freeholders, and those who were likely to be candidates at the next election, as to their willingness to support the repeal of the Test acts and the king's declaration; while the king used his personal influence with those around him to accomplish the same object. Every man of influence was introduced into the king's closet, and exposed to the blandishments of royal solicitation, and to the terrors of the royal displeasure. James had little reason to be satisfied with the result of this measure. Many persons refused to return an answer to the enquiry, while others boldly avowed their resolution to oppose the designs of the court.

R. E.

Sir John Lowther's answer was a very skilful and excellent one, and was adopted by most of his neighbours.

"1. If I be chosen a member of parliament for this county, or any borough thereof, I think myself obliged to refer my opinion concerning taking away the penal laws and the tests to the reasons that shall arise from the debate of the house.

"2. If I give my vote to any to serve in parliament, it shall be to such honest and loyal gentlemen as I think will faithfully serve the king and the established government.

"3. I will live peaceably with men of all persuasions, as a good Christian ought to do." *

SIR R. E.

Answers like these heated the impetuous temper of the king, more especially as he found resistance where he least expected it. Even the bloody and brutal Kirk, whose cruelties in the west exceeded those of Jefferies himself, had refused to change his faith, "replying briskly, that he was already pre-engaged, having promised the king of Morocco that if ever he changed his religion he would turn Mahometan." † All who refused their assent to the royal wishes were promptly displaced, and added to the number of the discontented. To obtain a parliamentary repeal of the obnoxious statutes was evidently impossible, and James, therefore, disregarding the powerful feeling of opposition which the nation displayed, determined to renew his declaration of indulgence, with some additional reasons for insisting upon the prosecution of it. Notwithstanding "the sullen murmurs of the church party," it was directed by an order in council that the declaration should be read on two Sundays in all churches and chapels throughout the kingdom, and the bishops were ordered to look to the performance of this duty. A measure like this, which compelled a large

* Lord Lonsdale's Memoir, p. 16. See the "Instructions to the Judges Itinerant." State Trials, vol. xii. p. 189.

† Burnet, vol. iii. p. 1166.

body of the nation to make their election between absolute submission and open resistance, was alone wanting to draw on the crisis. The clergy of the established church, disgusted and alienated by the proceedings of the court, were fortunately selected by the king as the parties upon whom the hazardous experiment should be tried. The professions of absolute obedience which that body had lately made, were now changed for the bold language which zeal for their faith, and alarm for their interests, dictated. Few of them obeyed the royal order, or if they obeyed it, declared their disapproval of it. One of them "more pleasantly than gravely," as the sedate bishop of Sarum observes, "told his people, that though he was obliged to read it, they were not obliged to hear it, and stopping till his congregation had departed, read the declaration to the walls." In many churches, when the minister began to read the obnoxious document, the people rose and went out in a body. * Conferences and communications as to the best mode of resisting the royal command were held amongst the clergy, and seven of the bishops ultimately resolved to petition the king not to insist upon the reading of the declaration. The petition was received by James with angry and menacing expressions; and soon afterwards, upon the advice of Father Petre, a Jesuit, who had been admitted into the privy

* Burnet's own Times, vol. iii. p. 1265.

council, the bishops were committed to the Tower to take their trial for publishing a seditious libel. They were conveyed to the Tower by water, and their progress exhibited one of the most singular and sublime spectacles ever witnessed in any land.

H. E.

I can never read the account of it without feeling that thrill which sometimes runs through one's blood when one listens to the notes of a trumpet.

SIR R. E.

The banks of the river were covered with people, who, kneeling as the prisoners passed them, implored their blessing, and encouraged them with loud shouts of applause; even the guards at the Tower caught the patriotic enthusiasm, and joined the populace in this noble manifestation of feeling. The obdurate temper of James, however, was unmoved by circumstances which would have dissuaded a wise, and terrified a fearful man; and the bishops were accordingly brought to their trial. Sir Edward Herbert the chief justice, stout courtier as he had shown himself in his judgment on Sir E. Hales's case, had been removed as not altogether corrupt enough for the present measures, and Sir Robert Wright was substituted in his place, a man, I believe, of very indifferent character.

H. E.

You treat him too leniently. He was an *élève*

of Jefferies, a dissolute man, and a wretched lawyer, not being able, as Roger North tells us, to give an opinion on a written case, but applying to his friends for opinions, which he afterwards copied in his own hand. *

SIR R. E.

A fit instrument for James to work with! This eminent lawyer, and one of his brethren, Allibone, a papist, gave their opinion, that the petition presented by the bishops was a libel; but Powell and Holloway, the other judges, differed in their judgment from their brothers, an act of rashness which they paid for by the forfeiture of their places. The jury, after remaining in deliberation the whole of the night, brought in a verdict of *not guilty*, and the rapturous applause with which this verdict was received by the populace, has been described by historians as absolutely astounding. It seemed as if the shouts which arose from the crowds collected in Westminster Hall would have cracked the magnificent roof above them. The acclamations repeated by those who stood without were conveyed with an electric rapidity on every side, and reached even the camp at Hounslow, where they were swelled by the voices of the soldiers. The king was at the moment in the earl of Feversham's tent, and when informed of the cause of the tumult, seems to have felt, for the first time,

* Life of Lord Guilford, vol. ii. p. 173.

the extent of the danger into which he had plunged himself.

The patience and forbearance of the nation had now reached their utmost limits, and all men looked with anxiety to the Prince of Orange as the person whose character and situation pointed him out as their deliverer. The interest which the prince had long taken in the politics of this country, his intimate acquaintance with all the leading men, his attachment to the reformed faith, and his sound judgment, well qualified him for the great task to which he was called; while his connection, both by blood and marriage, with the king, was a guarantee against the adoption of any rash or intemperate proceedings towards that unfortunate sovereign. I need not recall to your minds the events which immediately preceded the revolution — how hastily and unavailingly James retraced his illegal steps — offered to call a free parliament — restored the charter of London — replaced the president of Magdalen college — abolished the court of ecclesiastical commissioners, and reinstated those who had been deprived of their offices on account of their opposition to the repeal of the Test act. The late and compulsory repentance only served to add ignominy to his fall. I pass hastily over these circumstances to arrive at the grand crisis to which they led. On the flight of James, and the triumph of the Prince of Orange, it became necessary to debate the great

question of the settlement of the nation, as it was termed. The political frame of a vast empire had been broken up; the government was decomposed; and the awful duty was to be performed of again uniting the scattered elements. At this strange conjuncture, a resort to first principles was unavoidable; and in calling a convention of the people, recourse was had to the only source and fountain of all legitimate power. The lawyers, indeed, wished to cut the matter much shorter. They advised the prince at once to declare himself king, as Henry VII. had done, which would prevent all perplexing and tedious disputes.* Fortunately, however, the very clever proposition of the learned gentlemen was disregarded, and the representatives of the people met in council. The views which were now taken, and the schemes projected for a settlement, were as various as the capacities, the tempers, and the prejudices of the individuals from whom they proceeded. The convention was divided into three parties. The high church party, who had so long professed the doctrine of passive obedience, could not reconcile to their prerogative consciences the deposition of an absolute monarch, but proposed to call him back, and to treat with him for some security against the repetition of the arbitrary measures which he had lately pursued. The inconsistency of this proposal, with the principles of those who made it, was soon pointed

* Burnet's own Times, vol. iii. p. 1377.

out. Whether restored or not, James was still an absolute sovereign, entitled to the unconditional allegiance of his subjects; and to impose any restrictions upon his prerogative, would be at once to abandon all their former principles. They were, as Burnet tells us, "at a stand upon this objection," and joined the party of those who proposed a prince regent. The danger and inexpediency of the latter measure, which had not even the sanction of precedent to support it, were so evident, that the success of the third party who proposed to deprive James altogether of the crown he had shown himself unworthy to wear, was no longer doubtful. The dispute now assumed a different complexion; and the mode in which this great change was to be effected, and the principles upon which it was to be grounded, were the only matter in debate. Upon what principle, let me ask you, would you say that the nation in this instance was justified in selecting a new governor?

R. E.

Simply on the ground that James had shown himself, by his assumption of absolute power, his contempt for the laws, and his disregard of the wishes of the people, totally unfit to fill the throne, and that the well-being of the nation required his removal.

SIR R. E.

You are right, and such in fact was the principle

upon which our ancestors at this memorable period proceeded. It was necessary, however, to meet the doubts of the weak, and to satisfy the scruples of the prejudiced, who listened with distress and terror to such words as *deposition* and *forfeiture*, applied to a sovereign prince. The commons, therefore, voted, "That king James II. having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people; and having, by the advice of jesuits and other wicked persons, violated the fundamental laws, and withdrawn himself out of the kingdom, has abdicated the government, and the throne is thereby vacant." The Scottish convention, indeed, spoke in bolder and more sensible language, and declared that the king had *forfeited* the crown. The debates in the English convention as to the original contract between the king and people, and the use of the word *abdicate*, were warm and protracted, and, as it has been observed, "scarce became the greatness of that assembly, or the importance of the matter."

R. E.

If the doubts and scruples which you spoke of could be satisfied by the use of these words, it was surely politic and proper to adopt them.

SIR R. E.

It was so; and how easily many men at this time were governed by words, we may learn from

Burnet *, who details the argument by which the greater part of the high church clergy were won over to the new government. The reasoning ran as follows: "The prince had a just cause of making war on the king. In a just war, in which an appeal is made to God, success is considered as the decision of Heaven. So the prince's success against king James, gave him the right of conquest over him, and by it all his rights were transferred to the prince. His success was, indeed, no conquest of the nation, which had neither wronged him nor resisted him. So that, with relation to the people of England, the prince was no conqueror, but a preserver and deliverer, well received and gratefully acknowledged; yet with relation to king James, and all the rights that were before vested in him, he was a conqueror." Such are the miserable juggles which the minds of men sometimes mistake for reason. But while even the wise and enlightened might at the time find it prudent to adopt arguments suited to the intellects of those to whom they were addressed, it becomes us, at the present day, to state openly and truly the principles of this great revolution.

H. E.

I was much disappointed with the manner in which Sir William Blackstone has spoken on this subject. He seems to have treated it like a

* Own Times, vol. iii. p. 1415.

mere lawyer, and to have drawn from it no one great or useful principle.

SIR R. E.

I have always regretted this portion of the Commentaries: "I rather choose to consider this great political measure upon the solid footing of authority," says the commentator,* "than to reason in its favour from its justice, moderation, and expedience; because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient; whereas our ancestors, having most indisputably a competent jurisdiction to decide this great and important question, and having, in fact, decided it, it is now become our duty at this distance of time to acquiesce in their determination, being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it."

R. E.

Does Blackstone then mean to say, that we are debarred from all consideration of the justice and expediency with which our ancestors settled the government? If so, had they imposed an absolute monarchy upon us, we must have been concluded by such an exercise of their "competent jurisdiction," from questioning the propriety of it.

* Vol. i. p. 212.

H. E.

And why should the "distance of time" make it our duty to acquiesce?

R. E.

And why should being born under an establishment, built upon a foundation laid by our ancestors a century and a half ago, oblige us, without more, to maintain it?

H. E.

And why should not men have at least as much right to dissent from a measure alleged to be established on the footing of authority, as from a measure alleged to be established on the footing of justice, moderation, and expedience?

SIR R. E.

Stay, stay — you are really too hasty both for poor Sir William and myself; I attempt not to defend his logic. All his reasoning, moreover, is founded upon assumptions, and some of those assumptions are, unfortunately, at variance with the facts of the case. James did not abdicate the throne, if there be any meaning whatever in the word abdication; he was forcibly expelled and driven out. Were not the Dutch troops ordered to mount guard at Whitehall? Was not James wakened in the middle of the night, and told that he must leave the palace? Was not every facility afforded him for making the escape which his fears naturally dictated? And did he not expressly state in the declaration which he left behind him,

that he could not hope to be safe, so long as he was in the power of the Prince of Orange? * But "it was thought necessary to stick to the point of the king deserting his people †;" and upon this fiction, accordingly, the convention proceeded, though they might, with equal truth, have voted that the king had surrendered the crown, or that he was dead without heirs. The fiction, however, was sufficient to satisfy the mind of Sir William Blackstone; and viewing the question, according to the learned commentator, as one which rests upon authority merely, we can only hope, that should another James II. be ever found upon the throne of England (which God avert), some equally available fiction may be discovered to prevent the dreaded recurrence to principles.

We have now only to trace the steps which were taken by the legislature, to secure the nation from the return of the calamities in which it had lately been involved. The convention of the lords and commons having agreed in a declaration, "that William and Mary, prince and princess of Orange, be and be declared king and queen of England ‡," they were accordingly proclaimed; and by their authority a parliament was called, by which all the proceedings of the late convention were confirmed. When the crown was thus ten-

* Life of James, vol. ii. p. 274.
† Burnet's own Times, vol. iii. p. 1372.
‡ Chandler's Debates, vol. ii. p. 258.

dered to the new sovereigns, it was accompanied by a declaration of rights, which subsequently passed into a law, under the title of "An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown *," more usually known by the name of the *Bill of Rights*. The following are the provisions of this great declaratory statute, by which you will see that the repetition of those grievances, which had been for centuries the subject of so much complaint, was at length forbidden by express parliamentary enactment: —

1. That the pretended power of suspending of laws, or the execution of laws by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late court of commissioners, for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in any other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subject to petition

* 1 W. & M. sess. 2. c. 2.

the king, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants may have arms for their defence, suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech and debates, or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials of high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

Having now brought down our historical sketch to the revolution, from which period the constitution may be said to have maintained a settled cha-

racter, I wish, in as few words as possible, to state the result of our enquiries. We have seen, at the conquest, a form of government established adapted only to a rude and uncultivated people. The whole power of the state resided in the hands of the king and of his nobles; the people at large having no other check upon the government than the jealousy displayed by the barons, or great tenants of the crown, in the protection of their own rights and privileges. That body, indeed, was so numerous, and possessed so much of the property of the nation, that the members of it ought, perhaps, rather to be termed *the people* than the aristocracy. Illiterate, indigent, and powerless, the lower ranks were overlooked in the scheme of government. For two centuries this system continued; the barons, as they grew more powerful, wringing from the king concessions in favour of public liberty. But a new body was gradually growing up in the state: by the subdivision of the great landed estates, and by the operation of other causes, a third class was added to the community — small land-owners, and men of independent property, citizens and burgesses, and all that description of persons whom, in the present day, we denominate the middle classes. From these persons the king derived his chief supplies, but the attempt to extort them without their consent would have been in vain. Towards the end of the thirteenth century, therefore, the knights of the shire

and the representatives of cities and boroughs were summoned to parliament, and we trace, at this time, the grand outline of our present form of government clearly defined. From this period the commons grew rapidly in strength and importance, and, with the assistance of the lords of parliament, began to establish a wholesome control over the king's prerogative. With varying success, this great task was prosecuted through the reigns of the Plantagenets, and was not intermitted even during the wars of the roses. But by those unnatural conflicts, the power of the nobility was reduced to the lowest ebb, and on the accession of the Tudors, the commons alone were unable to cope with the strong arm of royalty. For upwards of a century, under the dominion of the Tudors, prerogative maintained its ascendancy; but in the mean time, notwithstanding the partial eclipse of the commons, the popular cause was gradually, although silently, gathering strength. The character of James I. afforded a favourable opportunity for the display of that strength, and under his sceptre the liberties of the nation made an almost incredible advance. The voice of the people was heard in the halls of his palaces. In vain did James deny to their solicitation those rightful boons which their situation entitled them to demand. In vain to the indignant complaints of his people he opposed the empty terrors of his prerogative. Could he stay the mountain-torrent with

his hand, or say to the waves of the ocean, be still? His son, with all his father's obstinacy, and more than his father's fatal blindness, breasted the full tide, and was overwhelmed. For a while reason and justice and moderation were borne along with the torrent; but even amid this scene of devastation the liberties of the nation survived. It might have been expected that the members of that family, whose great political lessons had been traced out for them in letters of blood, would, on their restoration to their country and throne, have profited somewhat by their long and bitter experience. But it was not within the range of possible events that a Stuart should understand the power, or regard the happiness of his people. The fate which, in a free country, awaits a weak and wicked king, overtook the last sovereign of that race, and the people vindicated their own great cause in his expulsion from the throne.

Throughout the whole of this period, from the conquest to the revolution, you will have observed, that though the government never bore any resemblance to a pure despotism, it was yet in its earlier age very imperfect in its character. The origin and commencement of almost all our noblest liberties and privileges may be traced by the skilful antiquary. But are they, therefore, less our undoubted right, or shall they therefore be termed concessions and free-will gifts of the crown, which we enjoy by its sufferance and permission?

They were, in fact, wrung from the unwilling hands of royalty, and our title to them is derived, not only from justice and reason, but from superior power. It is not because I wish to convince you that antiquity has sanctioned our liberties, that I have been at the pains of tracing the stream of our constitutional history to its source; it is that you may take example by the deeds of those to whom we owe the matchless blessings of a free government, and that you may thus never be wanting in that first virtue of a citizen, a jealous regard to the interests of freedom.

CONVERSATION XL

THE KING.

Sketch of the nature of the regal character, from the conquest. — Never purely arbitrary. — Crown hereditary under certain restrictions. — History of the descent of the crown. — The prerogative. — The king can do no wrong. — His various prerogatives. — His negative voice in the legislature. — His proclamations. — Change in the character of the regal powers. — Influence of the crown in modern times.

SIR R. E.

THE peculiar nature of the regal character immediately after the conquest, appears to be involved in much obscurity, but there is every reason to conclude, both from the narratives of historians, and the evidence of ancient documents, and perhaps, still more from the acknowledged character of the regal government in times not long posterior, that whatever may have been the occasional instances of oppression and misgovernment which are to be met with, the sovereign was at no time considered as constitutionally above the law.* It has been supposed, and with great semblance

* See the Rep. of the Lords on the Dig. of a Peer, p. 22.

of probability, that at this early period the king had three distinct councils, viz. the *concilium*, or ordinary council, consisting of such persons as were specially advised with by the king, the *magnum concilium*, comprising the principal persons of rank and property in the country, and the *commune concilium regni* a still more numerous body; and it has been conjectured, that when the proposed laws affected the whole body of the people, it was usual for the king to take the advice of the *commune concilium regni*. * At length, at the conclusion of the reign of Henry III., the legislative body assumed a new form, on the introduction of the representatives of the counties, cities, and boroughs, who from that time, or, at all events, within a short period afterwards, became a necessary component part of the legislature. Henceforward, therefore, the prerogative became subject to the vigilance and jealousy of parliament, and you have seen, in the course of our historical view, how various were the contests in which these two antagonist powers were involved. You have seen how reluctantly, under the sovereigns of the Plantagenet family, the court submitted to the salutary restrictions imposed upon its proceedings by parliament, how strenuously the commons urged their grievances, and maintained their privileges, notwithstanding the various attempts made by the crown to escape from the trammels imposed

* See the Rep. of the Lords on the Dig. of a Peer, p. 22.

upon its prerogative. From the conclusion of the reign of Henry III. to the commencement of that of Henry VII., that prerogative had been gradually circumscribed and bounded by the wisdom and boldness of parliament, but from the accession of the Tudors to that of the Stuarts, we have remarked a visible growth and increase of the kingly power. In the reign of James I. the commons resumed their great constitutional task of restraining, within the bounds which the welfare of the public demanded, the dangerous prerogatives claimed by the king. Here, then, we find the grand struggle again commenced, which the commons had so successfully prosecuted in the earlier part of their history. Unfortunately, however, neither James I. nor his son had the good sense to perceive, that the attitude assumed by the commons was the necessary consequence of the situation in which they were placed. That they sought to establish their privileges, because those privileges were demanded by the increasing intelligence and opulence of those whom they represented, and because they felt that they possessed the power of asserting their rights. We have seen how the contest proceeded, — how, to the rational demands of his parliament, James opposed the extravagant pretensions of his divine right. We have traced the story of royal obstinacy and popular resolution to its dreadful crisis in the great civil war, and we have mourned over the

eclipse which freedom suffered under the military despotism of Cromwell. On the restoration, we have seen how the most fatal lessons may be disregarded and contemned; we have seen Charles II. endeavouring to govern upon the same principles which had cost his father his head, and which ultimately drove his brother from the throne; and, finally, we have seen, in the accomplishment of the revolution, the establishment of that frame of government for which the commons had been for centuries contending. Having thus recalled to your minds what I may term the history of prerogative, I shall proceed to speak more particularly of the kingly office, its nature, powers, duties, and prerogatives. And first, with regard to its nature, I think the whole tenor of our enquiries had led to the conclusion, that the sovereigns of England have never, at any period of our history, been invested with absolute power. Courtiers, and servile ecclesiastics, and bigotted party-writers, have, indeed, asserted such a theory, but it is, as you have seen, contradicted by the most undoubted evidence.

The crown of these realms is, and always has been, hereditary, under certain restrictions, proceeding upon the ground of the crown being only held in trust for the people. Upon this point I cannot do better than refer you to the words of that excellent judge, Sir Michael Foster.

"There is, and for many ages hath been, a

certain order of hereditary succession established amongst us. But it was for the sake of the whole, and to avoid the many inconveniences to which an uncertain succession is subject, that this order of hereditary succession ever took place. For nobody can say, that this or any other particular mode of government is founded in natural right. Nature discovered the necessity of civil government, but the several modes of it are either matters of choice, resulting from mere necessity or accident.

"Hereditary succession, in monarchical states, is nothing more than an expedient in government, founded in wisdom, and tending to public utility. And, consequently, whenever the safety of the whole requireth it, this expedient, like all rules of mere positive institution, must be subject to the control of the supreme power in every state. Otherwise, a nation will, in numberless cases that might be mentioned, find itself under a fatal necessity of sinking into ruin, inevitable and irretrievable. But, certainly, no nation was ever doomed to submit to the greatest of all evils, out of pure deference to a prudential expedient; this is too absurd to be conceived." *

H. E.

The practice has coincided with Mr. Justice Foster's theory, for the line of succession has been broken in innumerable instances.

* Discourses, p. 404.

SIR R. E.

I will trace, as briefly as I can, the history of the descent of the crown. From the Conqueror, it descended to William Rufus, who, in strict right, ought to have been postponed to his elder brother Robert, and Henry I. succeeded also in derogation of Robert's right: on the death of Henry I., the crown descended to his daughter Matilda; but Stephen, the son of Adelicia, the daughter of the Conqueror, assumed it in exclusion of his cousin. In Henry II., the son of Matilda, the succession was restored to its proper channel, and on his death, his eldest son Richard I. took the crown by rightful inheritance: Richard dying without issue, his nephew Arthur, the son of his next brother Geoffrey, was, by right of representation, the next heir, but John, the younger brother of Richard, and the uncle of Arthur, seized the throne. On the death of John, and failure of the issue of Geoffrey, the right descended to Henry III., the son of John, and from him in regular succession to Edward I., Edward II., Edward III., and Richard II., in whose person the line was again broken. On the deposition of Richard, the next heir to the crown was to be sought amongst the descendants of Edward III. Mortimer, Earl of March, was clearly entitled to that character, as descended from Lionel, the third son of Edward III., but Henry, the son of John of Gaunt, Duke of Lancaster, as we have seen, obtained

the crown in preference to the Earl of March, though the title of the latter had been acknowledged in the reign of Richard II. Here, then, the house of Lancaster commenced, and the crown descended in that line through Henry V. to Henry VI. In the latter reign, the house of York, or the descendants of Lionel, Duke of Clarence, asserted their claim to the crown, and the true hereditary line was again restored in the person of Edward IV. On his death, the crown was scarcely placed on the head of his son, Edward V., when it was usurped by the uncle of that unfortunate Prince, Rich. III., from whose brows it was plucked on the field of Bosworth, by the Duke of Richmond, who claimed it as heir to the Duke of Lancaster, son of Edward III., though, according to the laws of hereditary descent, the right to it resided in Elizabeth, the daughter of Edward IV. By the marriage of the Duke of Richmond, Henry VII. with Elizabeth, the right to the crown on their death descended to Henry VIII., and from him in regular gradation to his children, Edward VI., Mary, and Elizabeth. On the death of the latter without issue, James VI. of Scotland, and I. of England, mounted the throne, as the lineal heir of Margaret, the eldest daughter of Henry VII., who had married James IV. of Scotland. From James the lineal succession was continued in his son Charles I., and on the restoration in his grandsons, Charles II. and James II. On the deposition of James II. a new line of succession

was limited by parliament, and the crown was settled, first on the Prince of Orange, and Mary the eldest daughter of James II. for their joint lives; and on the survivor of them, then on the issue of Mary, and on failure of such, on Anne, the second daughter of James II. and her issue; and on failure of such on the issue of William III., the son of Mary, the eldest daughter of Charles I. Towards the end of the reign of William, it was thought necessary to make a new parliamentary limitation of the crown, and accordingly by statute 12 & 13 W. 3. c. 2., usually called the Act of Settlement, the crown, after the death of William and Anne without issue, was settled upon the Princess Sophia, electress of Hanover, and the heirs of her body, she being the youngest daughter of Elizabeth, queen of Bohemia, the daughter of James I. The electress dying in the lifetime of queen Anne, the crown descended to her son, the elector of Hanover, George I.

We see, therefore, that the crown of these realms is not in its nature so strictly hereditary, as not to be subject to such limitations as the necessities of the nation require. The power of making such limitations is by the constitution vested in the legislature of the kingdom, not only by long continued usage, but by express enactment.* Nor is the right to the crown dependent only upon the voice of the legislature, consisting of the king,

* 6 Anne, c. 7.

lords, and commons; but where the crimes and misconduct of the sovereign call for so extraordinary and dangerous an interposition, upon the voice of the people at large, as in the great revolution of 1688. We have already discussed the principles upon which that transaction rests, and I shall, therefore, proceed immediately to the consideration of the royal prerogative.

H. E.

How ill that word has been understood, and to what terrible dissensions has it given rise! Even up to the revolution every one of our sovereigns seems to have thought that he was invested with his prerogative, not for the benefit of his subjects, but for his own exaltation.

SIR R. E.

The prejudice is not wholly extinct. Even at the present day we find persons who cannot regard the sovereign in the light of the first magistrate of a free commonwealth. How fatal and dangerous such opinions are, the slight sketch which we have taken of our constitutional history sufficiently evinces.

R. E.

But may it not have been useful, that even exaggerated notions of the king's powers should exist in the minds of the common people, inducing them to pay that obedience to the sovereign which

they would scarcely have extended to one whom they regarded as their own servant?

SIR R. E.

I confess I cannot see the utility of exalting the king's person with this object. The end is better gained by impressing upon the popular mind a due regard to the laws. But however they may have arisen, the king certainly possesses various prerogatives and immunities, which, abstractedly considered, seem scarcely consistent with our ideas of good government, but which have, in process of time, become so understood and modified, as not to trespass, in the due exercise of them, upon the liberties of the people. Thus, at the first view, the great prerogative maxim, that the king can do no wrong, is, when standing alone, a proposition so discordant with every notion of rational government, as to seem fitted only for the meridian despotism of Constantinople, but when considered in its true acceptation, it is merely descriptive of the mode in which the wrongs committed by the sovereign are to be redressed. The king, constitutionally, cannot act without advisers, and those advisers are responsible to parliament for every measure taken by the executive government. In this manner, therefore, the people have a guarantee against the commission of any wrongs by the sovereign, which are visited upon the heads of his responsible servants. Should the king, indeed, attempt to per-

form his executive functions without the interposition of his ministers, he would thereby subject himself to the perils which environ a sovereign who ventures to disregard the limits of the constitution, and which, in the case of James II., ended in the loss of the throne.

R. E.

But if the king commits a private injury, what redress can the party injured obtain? It cannot be gained by force of legal process, for the king's own courts have no authority over him.

SIR R. E.

It is true, there is no direct remedy, an inconvenience which might, perhaps, be provided for without any diminution of the regal splendor of the crown, or any infringement of the maxim which confers immunity upon the king's person. In practice, however, a remedy is found in cases of injury to property, by petitioning the king in his court of chancery, where, as a matter of grace, but not of right, justice will be done to the complainant. But the most effectual bar against the commission of such injuries is found in the control which public opinion exerts even over the actions of monarchs, and which no king of England will be found hardy enough to brave. In fact, at the present day, the sovereign is, perhaps, the very last person in the country who could be led into any open and direct violation of the law.

I pass over the maxims as to the king's absolute perfection and perpetuity, which are enumerated by some writers amongst his prerogatives, as words to which little meaning can be attached: at most they signify that he is not punishable by law, and that his office is perpetual. A more substantial and intelligible prerogative is the power of treating and making war or peace with foreign nations. The sole power for this purpose is vested by the constitution in the king; but, as in every other act of state, he is bound to exercise this power only through the medium of his responsible ministers. Even in very early times, as we have seen, it was customary for the king to consult parliament on these subjects, and, according to the course of government in modern times, it seldom has happened that any change has been made in our foreign relations without the approbation of parliament. Incidental to the prerogative of making war and peace, is the power over the army and navy, and the right of issuing letters of marque and reprisal, authorising the subjects of this realm who have been injured by those of another, to seize the subjects of the offending state, or their goods, and to hold them until satisfaction has been made to the party injured.

In his executive capacity, the king is the distributor of public justice. He has the prerogative of appointing the persons who are to preside over the courts of judicature. In very

early times justice was distributed by the king, sitting in his great council; but on the division of the *aula regis*, previously to the reign of John, and the formation of distinct courts of justice, the power which was formerly vested in the king, devolved upon the judges of his courts, and from this period the sovereign could not constitutionally sit in judgment upon the complaints of his subjects for justice, unless in cases which still remained cognizable by him in council, as at the present day, in appeals from the colonies. Originally the judges only held their offices *durante bene placito*, or during the king's pleasure; and you cannot fail to have observed in the course of your historical inquiries, with what facility they were induced to second the arbitrary designs of the court. At length the meanness and servility of the bench, in the reign of Charles II., led to the alteration which was effected soon after the revolution by the statute 13 W. 3. c. 2., whereby the commissions of the judges were directed to be *quamdiu se bene gesserint*, or during good behaviour, and not, as formerly, during the king's pleasure; and a further improvement was introduced at the commencement of the last reign, by statute 1 Geo. 3. c. 23., by which the judges are continued in their offices notwithstanding the demise of the king, which, before that act, had the effect of vacating the offices. As supreme conservator of the peace, the king is, in all cases

of criminal proceedings, the public prosecutor, and, incident to that character, possesses the privilege of pardoning such offenders as he sees fit.

R. E.

Does it not seem rather anomalous that, by the theory of the constitution, the king should be both the judge and the prosecutor?

SIR R. E.

It is the consequence of those singular fictions with which both our constitution and our law abound, and with which we are told to be content, because the absurdities to which they would seem to give rise do not exist in practice. Thus, in prosecutions, though the king's name is used, the party injured is, in fact, the prosecutor, and is even so termed; while the king is so far from being the judge, that he could not, even were he so inclined, resume his ancient right of sitting in judgment upon a criminal.

H. E.

So Sir Edward Coke told James I., to his majesty's grave displeasure: "The king, in his own person, cannot adjudge any case, either criminal, as treason, felony, &c., or betwixt party and party, concerning his inheritance, chattels, or goods, &c.; but this ought to be determined and adjudged in some court of justice, according to the law and custom of England." *

* 12 Rep. p. 64.

SIR R. E.

In legal proceedings in which the king is interested, he enjoys many privileges and immunities not accorded to his subjects.

H. E.

Do you think this is quite right?

SIR R. E.

I confess I have my doubts as to the propriety of such rules. Where the object is to do justice, it should seem that the process ought to be the same whether the controversy arises between subject and subject, or between the crown and the subject; — but this discussion will lead us too far.

The king is the fountain of honour. All titles and dignities are derived immediately from his hand. Thus, he creates peers by his writ or letters patent, and knights by corporeal investiture. He has also the power of creating offices; but he cannot annex fees to an office newly created which would tax the subject, without the assent of parliament. * As the king is the creator of honours, so he may grant privileges in the nature of honours, as when, by his letters patent, he gives precedence to one barrister at law to take place of his brethren. There are also inherent in the crown a variety of other undisputed prerogatives, to which I shall only very briefly advert, in order

* 2 Inst. p. 533.

that I may have time to notice more particularly certain more important prerogatives, the existence and exercise of some of which have afforded much matter for controversy.

H. E.

I suppose you allude to the dispensing power?

SIR R. E.

I do; but first let me enumerate some of the minor prerogatives. The king may erect corporations, establish the franchises of markets and fairs, regulate weights and measures, create the current coin of the realm; and, lastly, he has the power of regulating all ecclesiastical affairs, in right of his character of supreme head of the church. For further details as to all these prerogatives, I must refer you to the first volume of Sir William Blackstone's Commentaries.

No question within the whole range of our political history has been more earnestly debated than that of the dispensing power. The advocates of prerogative, on the one hand, pushing the doctrine to its extreme limits, have affirmed, with Dr. Cowell, in the reign of James I., that the king "may alter or suspend any particular law that seems hurtful to the public estate." * While, on the other hand, the friends of free government have contended that in no case whatever can the sovereign, without the consent of parliament, dis-

* Cowell's Interpreter, Art. King.

pense with any of the laws. Upon principle, and according to the just theory of the English constitution, it cannot be doubted, that the existence of such a power must be regarded as incompatible with our free government; since it would enable the king to prevent the operation of every law passed for the preservation of public liberty, and would, in fact, place the property and liberty of the subject at his disposal. Indeed, at no period of our history does it seem to have been contended, that the king possessed an universal power of dispensing with the laws; for it was generally acknowledged, that he could not dispense with a statute prohibiting that which was *malum in se*; and that he could not by his dispensation diminish or prejudice the property or private right of the subject. But in cases of *mala prohibita*, where the act denounced was not in itself morally criminal, it was the doctrine of our lawyers, founded, however, upon questionable authorities, that the crown might dispense with the prohibiting statute; though some confined the power to those statutes which were made for the king's profit or interest, and held, that it did not extend to such as were made for the public good. By others again it was said, that the king could dispense not generally, but only in favour of particular persons. *

H. E.

Pray which of these theories is the correct one?

* See Hargrave, note, Co. Litt. 12 a.

SIR R. E.

It is really impossible to say; for nothing like a certain rule can be drawn from the numerous instances in which the crown has attempted to exercise the power. All that we can safely say is, that a power of dispensing, either general or special, according to the circumstances of the case, with statutes, whether made for the king's profit, or for the public good, was not unfrequently exercised by the king, and was submitted to or complained of by the commons, according to the strength of their resolution, or the mischief of the case. The power certainly existed; but its limitations were never defined. It was one of those blemishes in the constitution which required only to be fairly displayed, in order to be corrected. That display occurred in the case of Sir Edward Hales, which we have already considered; and accordingly, on the Revolution, the exercise of the dispensing power in any case was prohibited, except where the king is specially authorized by act of parliament.* For the arguments against the dispensing power, you may refer to Tyrrel's Bibliotheca, and Petyt's Jus Parliamentarium; for those in its favour, to the case of Sir Edward Hales in the State Trials, and to the other cases there cited.

R. E.

You have not as yet spoken of the king's

* 1 W. & M. sess. 2. c. 2.

negative voice in the legislature, and of the manner in which it may be constitutionally exerted.

SIR R. E.

The king, in these respects, enjoys only the same privilege with both houses of parliament, without whose concurrence no bill can pass into a law. It is undoubtedly competent for him in every case to grant or to withhold his assent, as he sees fit; but should it be withheld contrary to the interest of the nation, and the wishes of his parliament, the ministers who advised so dangerous a course would, no doubt, be held responsible for the consequences.

H. E.

In early times, the king seems to have been in the frequent practice of refusing bills.

SIR R. E.

Even down to the time of William III., it was by no means an uncommon occurrence. Elizabeth sometimes refused as many bills as she passed; and William, in the year 1693, refused his assent to the bill for triennial parliaments, though it was granted in the following year. So in the year 1692, he very injudiciously withheld his assent to a bill which had passed both houses for establishing the independence of the judges; a measure which we have seen was not accomplished till the passing of the act of settlement several years

afterwards. According to the modern constitution of the house of commons, and the manner in which the business of that house is conducted, it can rarely happen, that the king should lie under any temptation to exert this obnoxious prerogative.

R. E.

What is the extent of the king's prerogative in the making of proclamations?

SIR R. E.

We have already had occasion to advert to that subject; but it will, perhaps, be well to state the true limitations of this prerogative, which, like many other branches of the royal power, has been frequently abused. In studying some portions of our history, we might almost imagine, that our kings intended, by their frequent and daring proclamations, to supersede the legislative functions of parliament, and yet there is no doubt that these royal edicts were never acknowledged to have the force of laws. It is only where a proclamation is grounded upon, and intended to enforce the known law of the land, that it can have any operation. Even in a case of urgent necessity, when the king, in consequence of a public scarcity, by proclamation laid an embargo, in time of peace, upon all vessels laden with wheat, it was deemed contrary to law, and the parties acting under it were indemnified by a special act of parliament. *

* 7 G. 3. c. 7.

R. E.

The character of the regal power in modern times seems to be very different from that which we observe in the earlier periods of our history, and, indeed, until the Revolution. In former days the personal character of the sovereign had a most powerful influence over the fortunes of the nation; while, at present, its weight is very light in the balance of the constitution. Would you be good enough to explain the reasons of this change?

SIR R. E.

I should attribute it principally to the change in the character of the house of commons, which, in modern times, has exercised an influence in the government altogether unknown to our ancestors. The votes of that house are swayed by other motives than royal frowns or royal blandishments, and a speech from the throne in the threatening style of James I. would be merely matter of ridicule. But while the personal influence of the sovereign, if I may so call it, has been thus circumscribed, the actual influence of the crown has received an accession in modern times which more than counterbalances every loss. The ascendancy which the king's government has gained in the house of commons is the most remarkable feature of our modern politics. We have seen the first dawn of this influence in the attempts made by the Plantagenets to influence the election of members, a

practice in which scarcely one of their successors failed to imitate them; we have seen it in the bribes distributed by the ministers of Mary; a system of direct corruption which grew to great rankness under the Stuarts, and reached still higher perfection under Sir Robert Walpole, in the last century. The decency of our own times has, indeed, induced a change in the mode of securing this influence; but though the means are changed, the end is attained with even greater certainty. The grand instrument of the power of the crown in our days is its PATRONAGE, a patronage so extensive, varied, and important, as to find its way into every minute ramification of society. With the power of rendering thousands and tens of thousands independent in their circumstances, nay, wealthy, and often enormously wealthy, can it be wondered that the influence of the crown has extended itself in modern times? Public honours, public situations of all kinds, offices of state, in the church, in the law, thousands of commissions in the army and in the navy, all in the gift and at the disposition of government, give it an overwhelming power. When I tell you that there are upwards of ten thousand persons employed in the customs and excise alone, whose salaries amount to considerably more than a million annually, you may form some idea of government patronage. A member of the house of commons, who chooses to support the government, has generally his share

in the distribution of this patronage. What man, however honest, can weigh the exact degree of influence which a knowledge of this circumstance exercises over his opinions? And how incomparably stronger are these golden bonds than the bolts of the Tower with which Elizabeth occasionally threatened her commons! I cannot give you a better idea of the influence of the crown than by reading to you a passage from a volume, the perusal of which has, I hope, been a pleasure and an advantage to us all.

"If we here sum up, in a few words, the influence of the crown, we shall have to reckon new peerages, and steps in the peerage, bestowed with great profusion; ribands, blue, red, and green; six archbishoprics, and forty-two bishoprics, some of them 20,000*l.*, and many above 8,000*l.* a year in value; military and civil commands in Ireland, India, Ionian islands, Gibraltar, Jamaica, Barbadoes, Trinidad, Cape of Good Hope, Canada, &c. &c.; embassies to Paris, Vienna, Petersburg, and Brussels, of 12,000*l.* a year each; others of 3,000*l.* and 2,000*l.*; regiments in the army, ships in the navy; officers of all kinds at home and abroad; more than a million of civil list, containing lord chamberlains, lord stewards, and numerous inferior officers; rich livings, falling in every week; valuable appointments to India greatly increased in amount; about two millions for the salaries in the offices for collection of the

revenue, and two millions for expences; retired allowances to a tenth of that sum; clerkships, hospitals, contracts, &c. and an establishment, costing in the whole 18,000,000 *l.* a year."*

* Lord John Russell's Essays on the Constitution, p. 424.

CONVERSATION XII.

THE HOUSE OF PEERS.

Origin of the house of peers. — The *commune concilium*. — Of whom composed. — Separation into *majores* and *minores barones*. — Barons by *tenure* and by *writ*. — Modes of creating peers. — Bishops. — Inferior clergy. — Number of peers. — Scotch peers. — Irish peers. — Functions of the house of lords. — Jurisdiction of the house anciently, in both civil and criminal matters. — Taken away by statute. — No original civil jurisdiction. — In cases of appeal. — For the trial of peers. — Privileges of the lords. — Proxies. — Protests.

To-day I shall endeavour to give you some account of the constitution, functions, and privileges of the house of lords, considered as one of the constituent portions of the legislative body. We have seen that, in the reigns of the Norman kings, it was customary when any national affairs of importance were to be transacted, to convene an assembly which was termed the common council, or great council, according to the number of the persons by whom it was attended. The general appellations which we find applied to those persons, were *magnates*, *proceres*, *barones*, *fideles*, or *liberi homines*; and occasionally the various ranks

of the persons assembled are specified as *archiepiscopi, episcopi, abbates, priores, comites, et barones,* to which we sometimes find added the words, *et alii magnates et proceres regni.* What persons were included under these various appellations, has been the subject of much doubt, and of much heated controversy. The two principal theories are these: — 1. That the common council of the realm was an assembly at which every free man had a right to be present; a position advocated by Mr. Petyt and Mr. Tyrrel. 2. That the king's tenants in capite were the only members of this council; which is the theory of Dr. Brady. Even with all the assistance which a diligent examination of the original records and documents afforded, the committee of the lords, who reported "on the dignity of a peer," found themselves unable to form any satisfactory theory on this subject*; and you will not, therefore, be surprised that I refrain from offering any thing like a decided opinion. Perhaps, however, it may be useful, in guiding us to a right conclusion, to consider the objects for which this assembly must have been convened; and we may then be able to form some opinion as to the particular description of persons whom it was necessary for the king to summon to it. It is probable that one of the main objects of convoking these councils was to grant supplies to the king, which he could not venture to take with-

* Reports, p. 27.

out the consent of the parties; and at the same time there seems to be little doubt that upon other points, equally affecting the interests of the persons assembled, their advice and concurrence were required. Now, in the reign of the Conqueror, when, in consequence of confiscations and forfeitures, the principal part of the landed property of the kingdom was held of the king *in capite*, it should seem that whatever measures the king took, with the consent of the tenants *in capite*, he might be well assured of carrying into effect. To assemble any other body would, therefore, have been nugatory. The number of the tenants who held of the king *in capite* gradually increased; and in the reign of John they became so numerous, that a distinction was made between the *greater* and the *lesser* barons. In that clause of Magna Charta by which no taxes were to be levied "without the common council of the realm," we have these words: — "Et ad habendum commune concilium regni, de auxilio assidendo, aliter quam in tribus casibus prædictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et *majores barones* sigillatim per literas nostras, et præterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos [*or* alios] qui de nobis tenent in capite, ad certum diem," &c. This clause appears to me to afford a strong argument in favour of those who contend that the *commune concilium* was

formed by the tenants *in capite* only, for the king undertakes to convoke that body, and then states what persons he will summon to it, who appear to be only the tenants *in capite*. At what time the distinction noticed in the great charter, between the greater and lesser barons, was introduced, and whether, after this time, the latter continued to attend the meetings of the *commune concilium* until the establishment of the representative system at the conclusion of the reign of Henry III., cannot now be ascertained. It is possible that, as the minor tenants *in capite* grew more numerous and less wealthy, they gradually discontinued their attendance upon the council, which probably led to the institution of representatives.

R. E.

You suppose, then, that it was in right of their lands that the tenants *in capite* were summoned to attend the *commune concilium?*

SIR R. E.

It was in right of their superior wealth and importance, which depended at that time upon their landed possessions.

R. E.

Then were all these persons peers of parliament and barons?

SIR R. E.

Whether all the tenants *in capite* who attended the *commune concilium* came properly within the

denomination of *barones*, has been the subject of much controversy. Selden conjectures, that before the reign of John every tenant in chief was indifferently an honorary or parliamentary baron, by reason of his tenure or lands held, which made his barony.* This opinion has been controverted by Madox, who maintains that tenure by knight's service *in capite* was distinct from tenure by barony.† Certainly, at the time when the great charter was granted, a distinction had been introduced between the *majores barones* and the other tenants *in capite*; and in the reign of Henry III. we find the *barones* and *milites* (tenants by knight's service) mentioned as distinct persons.†

H. E.

In what manner were the councils convoked?

SIR R. E.

Before the reign of John, it seems probable that the different tenants *in capite* were specially summoned to attend the assembly; but by the great charter, the greater barons were to be summoned specially, and the tenants in chief generally by the sheriff. From this period, therefore, if the minor barons continued to attend the council, it was, probably, in pursuance of a general writ to the sheriff of each county, directing him to summon them as tenants *in capite*.

* Titles of Honour, p. 586.
† Report on Dignity of a Peer, p. 87. 90.

R. E.

If the king summoned any one to the council who did not hold of him by knight's service, or by barony (if there be a distinction between the two), what was the effect of such a summons? Did the party summoned become a peer of parliament? and, if so, did the dignity descend to his heir, as I suppose it did in the case of baronies by tenure?

SIR R. E.

Although originally, as we have seen, the persons summoned to the council were summoned in respect of their tenures, yet it seems to have been the practice to summon by writ persons who were not members of the council, to give advice or information to the king on particular occasions.* This practice was probably the origin of barons *by writ*, as distinguished from barons *by tenure*. In the reign of John or Henry III., when the constitution of the council had suffered a great alteration by the separation of the minor barons, the two kinds of barons appear to have been first distinguished. "Barons by writ and tenure," says Selden †, "were such as having the possession of ancient baronies, were called by several writs to the parliament, according to that of king John's charter which concerns the *majores barones* of the time of making it. Barons by writ only were such as were

* Report on the Dignity of a Peer, p. 451.
† Titles of Honour, p. 591.

called by a like writ of summons, although they had no possessions that were honorary baronies."

H. E.

Suppose a baron by writ and tenure sold the land, did he cease to be a peer?

SIR R. E.

Prynne mentions instances of alienations of baronies by sale, gift, or marriage, after which the new purchasers were summoned instead*; but Selden says, that in such cases the barons became barons by writ only, retaining their ancient place and dignity; an opinion which appears to be sanctioned by the late enquiry into the dignity of a peer.†

R. E.

Did the mere summons to parliament ennoble the blood of the party, and render the honour hereditary?

SIR R. E.

It is a point of much doubt; but I rather imagine that originally the summons had no such effect. The modern doctrine on this subject is thus laid down in a work to which I have frequently had occasion to refer: "The blood of a temporal lord is considered as ennobled by a writ of summons to parliament, and taking his seat under that writ; and unless the terms of the writ, or of the

* 1st Reg. p. 239. † Rep. p. 447.

patent under the authority of which it issues, provide to the contrary, he now gains by the writ and his seat in parliament thereupon, an hereditary honour descendible to the heirs of his body, whatever may have been formerly the law upon the subject." *

R. E.

Is a writ of summons, then, the only mode in which the king can create a peer?

SIR R. E.

No; there are two other modes: by letters patent, and by act of parliament. When a peer is created by the king's letters patent, he immediately becomes a peer, and ennobled by virtue of the letters patent; the dignity descending according to the terms of the letters patent. The summons to parliament is in this case a mere consequence of the right given by the letters patent, and does not by itself confer the dignity. The first creation by patent is said to be that of Lord Beauchamp, 10 Richard II. There are several cases between the reigns of Edward III. and Henry VII. of the creation of peers by act of parliament; but the practice was never general, and has now fallen into complete disuse.

H. E.

By what right do the bishops claim their seats in parliament?

* Report on the Dignity of a Peer, p. 393.

SIR R. E.

It is said to have been the opinion of Lord Hale, that the bishops do not hold their possessions *per baroniam*, and that they sit in the house of peers by custom and usage*; but this doctrine has been controverted, and, in fact, appears to be incorrect. The archbishops, bishops, peers, and abbots, were summoned to the great council, like all the other persons who were there present, in consequence of the importance attaching to them from their vast territorial possessions; and on the formation of the house of peers in its present shape, they continued to give their attendance in the same right. The privilege of sitting in parliament is a franchise annexed to the possession of the temporalties of the see, and before he is invested with those temporalties, a bishop, though consecrated, and thereby in possession of the spiritual dignity, cannot have a writ of summons to parliament.†

H. E.

Had none but the dignified clergy you have mentioned the right to sit in parliament?

SIR R. E.

It appears from the form of the writ of summons to a bishop, that the dean, the archdeacon, and certain proctors for the body of the clergy were directed to attend with the bishop; but the practice

* Notes to Co. Litt. p. 70.
† Report on the Dignity of a Peer, p. 393.

was discontinued at an early period; nor is it very clear for what purposes those inferior clergy were summoned.

R. E.

The bishops, I suppose, do not form a separate and distinct body in the house of peers. I mean, that the consent of a majority of their bench is not necessary to the validity of an act of parliament.

SIR R. E.

Although a statute enumerates "the lords spiritual and temporal," yet it would certainly be valid, though all the spiritual lords should vote against it, of which there are many instances. *

R. E.

May the king make as many peers as he pleases?

SIR R. E.

He may; but of course this prerogative, like others, has its constitutional limits. Any attempt to obtain an undue influence in the house, by the sudden introduction of a multitude of new peers, would doubtless subject the royal advisers to the severest reprehension of the commons. In the reign of queen Anne, as you may remember, in order to serve the views of the court, the extraordinary measure of creating twelve new peers, at the same time, was resorted to; a proceeding which caused the greatest dissatisfaction. When

* Selden's Baronage, p. 1. c. 6. 2 Inst. 585.

I state, that the king can add at his pleasure to the numbers of the house of lords, I must be understood to speak only of English peers; for though the crown has the power of conferring the title of a Scotch peer, yet, by the act of union, the number of Scotch peers entitled to sit in the house of lords is limited to sixteen; who are elected by the peerage of Scotland as their representatives. So by the act of union with Ireland, four lords spiritual of Ireland, by rotation of sessions, and twenty-eight temporal peers, elected for life by the peers of Ireland, shall sit in the house of lords, and the king may keep up the number of one hundred Irish peers.

The *functions* of the house of lords, as a component part of the legislature, are, the introduction of such bills as the house may think fit to be passed into laws (except money bills, which can only be originated in the house of commons, as we shall presently see), and the granting or withholding their assent to the bills brought up by the commons. But, in addition to their legislative character, they form a high court of judicature. As the power thus exercised by the lords is of the highest importance, I shall endeavour to present to you a short historical account of its origin and progress.

The judicature exercised by the house of lords is of two kinds. 1. Their appellant jurisdiction. 2. Their jurisdiction in the trial of peers, in and

out of parliament. A great question has also existed as to the *original* jurisdiction of the lords in civil cases.

H. E.

I think Mr. Hargrave has illustrated this subject in the preface to Lord Hale's Jurisdiction of the Lords.

SIR R. E.

He has; and I shall follow that work as my guide through this enquiry. The origin of the jurisdiction of the lords may be traced to those times when the king used to distribute justice in the assembly of his great council; consisting of his tenants in chief, by whose advice he acted not only in the government of his realm, but in the distribution of justice. On the institution of separate courts of justice, which, probably, took place before the reign of John, complaints for redress were, no doubt, in most cases, carried before those tribunals; but the great council still retained a species of jurisdiction, the peculiar character and nature of which, at this distance of time, it is extremely difficult to ascertain. Whatever the extent of that jurisdiction may have been, it appears that in the reign of Edward I., the house of lords, which had succeeded to the great council, exercised a frequent jurisdiction, not only in causes between party and party, but also in criminal cases. This practice was so well established at this period, that there can be no doubt

of its legality; but being found highly inconvenient, as drawing the cognizance of suits from the common law courts, before a very arbitrary tribunal, many petitions against it are to be found on the rolls of parliament, which led to the statutes of 5 Ed. 3. c. 9. 25 Ed. 3. st. 5. c. 4., and 42 Ed. 3. c. 3. By which it is enacted, that no one shall be put to answer in criminal cases without presentment (that is, without the intervention of a jury), nor touching his freehold without due process of law. Notwithstanding those statutes, it continued to be the practice to appeal persons of treason or of misdemeanors before the house of lords; but by 1 Hen. 4. c. 14. such appeals were entirely taken away. The only criminal jurisdiction, therefore, which the house of peers now possess, is the power of sitting in judgment upon the trial of a peer, or of parties brought before them by impeachment of the commons.

With regard to the original civil jurisdiction of the lords, it has been denied by Sir Matthew Hale, and it has been long settled that such a jurisdiction does not exist. No suit for redress for a civil injury can be commenced, in the first instance, in the house of lords. In early times, indeed, it was a common practice to exhibit petitions for redress in such cases to the lords: but in this instance the house, according to Hale, only exercised a jurisdiction by way of transmission; that is to say, they remitted the petitions to the

king's ordinary courts, sometimes generally, sometimes specially, with directions touching the mode of proceeding, which was rather an act of advice and counsel, than an exercise of jurisdiction. * In the reign of Charles II., however, a bold attempt was made by the lords to establish a direct jurisdiction in civil cases. A man of the name of Skinner, having, as he alleged, been injured by the East India Company, presented a petition to the king for redress, which, after an examination before the privy council, was transmitted to the house of lords, with a recommendation from the king that they should do justice to the complainant. The lords accordingly took cognizance of the case, and adjudged 5000*l.* damages to Skinner. The East India Company in the mean time had petitioned the house of commons, who espoused their cause in the warmest manner, and wholly denied the jurisdiction of the lords. A contest now arose between the two houses of a most extraordinary nature, each, without scruple, imprisoning all the parties who dared to oppose their own views, as guilty of a breach of their privileges. In vain did the king prorogue them; they met each time with renewed animosity, till, wearied at length with the protracted dispute, both houses assented to a proposal made by the king, that all the proceedings relative to the case should be

* Hale's Jurisd. of Lords, ch. 17.

erased from the journals.* The contest, therefore, terminated in the discomfiture of the lords, who no longer ventured to insist upon the legality of their interference. From this period no claim has again been made by the lords to an original jurisdiction in civil cases.

But in cases of *appeal*, the house of lords has long possessed a well-defined and acknowledged jurisdiction. From the courts of common law it was never denied that such an appeal lay; but in the case of appeals from the court of chancery, the jurisdiction of the lords was not finally acknowledged until the reign of Charles II., when the matter was controverted between the two houses of parliament, and the commons ultimately acquiesced in the claim instituted by the lords.†

R. E.

Is there an appeal from every court of justice to the house of lords?

SIR R. E.

Either mediately or immediately, there is from all the superior courts at Westminster. But in many cases the writ of error cannot be brought immediately in the house of lords, but in the next superior court.

R. E.

What is the form of proceedings, when the lords sit for the trial of one of their own members?

* Hargr. Pref. to Hale, p. ciii. † Id. p. clxv.

SIR R. E.

A true bill being found against the peer, it is removed by a writ of *certiorari* into the court of the lord high steward, as the assembly of peers is termed, if the trial takes place while parliament are not sitting. The lord high steward is in general specially appointed, for the purpose of presiding in this court. The indictment being removed before him, he issues a precept to the peers, summoning them to attend at the trial, and by stat. 7 W. 3. c. 3. all the peers must be summoned. The lord high steward is to expound the law, and the peers act as a jury, and the accused is convicted or acquitted by a majority of voices. If the trial takes place during the sitting of parliament, the assembly is termed not the court of the lord high steward, but the court of the king in parliament, and the lord high steward in that case only acts as the speaker of the house, and does not undertake to expound the law.

R. E.

Are there any privileges peculiarly affecting the house of lords?

SIR R. E.

The chief peculiar privileges are the right to vote by proxy, and that of entering a protest on the journals of the house against any successful measure which the protesting peer may think injurious.

CONVERSATION XIII.

THE HOUSE OF COMMONS.

Origin of popular representation. — Of county representation. — 49 Henry III. — Who were the electors. — Representation of cities and boroughs. — Irregular practice. — In what character the commons were summoned. — Number of representatives. — Power of the king to grant the right of returning burgesses. — Qualifications of electors — in counties — in boroughs. — Qualification of the candidates. — Times of calling parliaments. — Mode of passing acts. — Money bills. — Privileges of the Commons — impeachments — privilege of speech. — Character of the Commons. — Reform.

SIR R. E.

I DO not know a more difficult and obscure subject than that which must engage our attention to-day — the origin of popular representation in this country. After employing the industry, and exciting the passions of numberless party writers, it still remains enveloped in historical darkness. While the lovers of prerogative have laboured to show the comparatively late establishment of the commons, founded, as they repeat, on the concessions of the crown; their adversaries have stoutly maintained the immemorial existence of the democratical portion of our constitution, discovering

(according to the courtly Brady) in the boroughs of England, "so many ready-wrought and framed small commonwealths lifted out of chaos, and fixed upon the surface of the earth with their walls, gates, town or guildhalls, courts, liberties, customs, privileges, freedoms, jurisdictions, magistrates, and officers."

R. E.

Just as probable a theory as so many ready-made kings lifted out of chaos, with their thrones, sceptres, palaces, yeomen of the guard, and pages of the back-stairs. I suppose both the boroughs and the kings have grown out of the exigencies of society, much in the same way.

SIR R. E.

You seem as eager to enter the lists as any of the valiant knights who have broken their political lances in the quarrel. Let us, however, proceed temperately. The origin of *county* representation may, perhaps, be traced so early as the reign of John. In the fifteenth year of that reign, the king issued writs, commanding the sheriffs of different counties to cause to come to the king four discreet knights of each county, "ad loquendum nobiscum de negotio regni nostri." * In what manner these knights were to be elected does not appear. It has been conjectured, that they were summoned by the king to balance the power of the hostile nobles.†

* Rymer's Fœdera, new ed. vol. i. p. 117.
† Report on Dig. of a Peer, pp. 60, 61.

Two years afterwards, we meet with another writ, enjoining the election of twelve knights to enquire into bad customs.* Again, in the tenth of Henry III., a writ is extant, commanding the sheriff of Gloucestershire to summon four knights, elected by the knights and *probi homines* of his county, to be present at Lincoln, in order to state certain grievances.†

In the 39th of the same reign a writ is found for summoning two good and discreet knights of the county, whom the men of the county shall have chosen for this purpose, to consider, along with the knights of other counties, what aid they shall grant the king. ‡ These authorities seem to show that a practice, however unsettled, had been introduced of convoking the representatives of the knights or proprietors of the landed property of the kingdom. The final establishment of county representation, however, is usually assigned to the year 1265 (49 Henry III.), when writs were issued in the king's name by Simon de Montfort, directing the sheriffs to return two lawful and discreet knights for every county: while the citizens of York, Lincoln, and the other boroughs of England are commanded to send two of the most discreet men. § By what class of persons the knights of the shire were to be chosen has been

* Brady's Hist. vol. i. Appendix, p. 150.
† Report on Dignity of a Peer, p. 88.
‡ Id. p. 94.
§ Elsynge on Parl. p. 13. Pref. to Stat. p. xi.

the subject of much discussion. It is contended by many writers, amongst whom are Spelman, Brady, and Carte, that, as the representatives of counties seem to have succeeded the lesser barons, whose attendance was originally required in the king's court, those representatives must have been chosen by the body they represented, — the tenants *in capite*. On the other hand, it is argued that the right of election extended to all the freeholders of the county, that is, all who had a right to attend the county court, and included the mesne tenants, or freeholders not holding immediately from the crown. Perhaps the strongest argument in support of the latter position is, that no traces remain of the change (and a most important change it must have been) in the nature of the county franchise; and, therefore, upon the whole, I am inclined, though with much doubt, to coincide in the opinion that the knights were elected by the freeholders at large. *

If we refer the introduction of the knights of the shire into parliament to the reign of Henry III., I think we cannot place the representation of boroughs at an earlier date.

R. E.

Did the burgesses continue to be regularly summoned to parliament after the 49 Henry III., which, from all you have said, appears to be the

* See the Edinburgh Rev. vol. 26. p. 343. and vol. 35. p. 29.

earliest period which can be fixed upon, with certainty, as the date of their introduction?

SIR R. E.

Whether from that time they constituted a necessary part of the legislature, has, like the rest of their early history, been much doubted. The preamble of the statute of Marlbridge, 52 Hen. 3., is, "convocatis discretioribus ejusdem regni, tam majoribus quam minoribus,*" which latter expression has been thought to point out the commons. So the statute of Westminster the first (3 Edw. 1.) is said to be made by the assent of the archbishops, &c., and all the *commonalty of the realm*, being summoned to Westminster. † Similar expressions occur in the preamble to the statute of Gloucester (6 Edw. 1.); ‡ and there exist other authorities to the same effect. § It has also been made a question, whether the burgesses, or only the representatives of cities, were present at these parliaments; and a passage from the Annals of Waverley has been cited in support of the latter conjecture. ‖ It is, indeed, contended by Brady, that, with the exception of the parliament of 49 Henry III., the first time we find any citizens or burgesses summoned to parliament is the 23 Edward I.; and he has given the writ by which the sheriff is directed to summon from each county

* 2 Inst. p. 101.
† Id. p. 156.
‡ Id. p. 279.
§ Edinb. Rev. vol. 35. p. 33.
‖ Parl. Hist. vol. i. p. 81.

two knights; from each city, two citizens; and from each borough, two burgesses: and, as a proof that the citizens and burgesses were not summoned before this time, he tells us, that a bundle of writs are extant, of summonses to the parliament of 18 Edward I., in which there is no mention of citizens or burgesses. * Such are the conflicting authorities: it is for you to choose between them. Even the industry and ingenuity of the committee "on the dignity of a peer" have been found insufficient to clear up this difficulty; and the only conclusion to which the committee have come, is, that there was no regular practice on the subject. †

H. E.

As Brady's is only a negative argument, I certainly feel inclined to coincide with his adversaries.

R. E.

Perhaps the safest position is, that in the reign of Edward I. the commons became a recognised component part of the legislature.

SIR R. E.

I agree with you; but it is not so clear whether at this time their assent was essential to the making of every law. The ground upon which the commons first gained a footing in the legislature, probably, was their liability to taxation; and it seems not unlikely that, at first, they were

* Brady on Bor. p. 54. 56. † Rep. p. 234.

only summoned for the purpose of giving their assent to such taxes as the king might wish to raise. Very speedily, however, they assumed the power of addressing petitions to the king on the subject of grievances; and these petitions, granted by the king, and assented to by the lords, had the force and effect of laws. At the same time, every measure which, like taxation, affected the rights of the commons, was probably submitted to them for their approbation, and thus, gradually, they acquired the privilege of yielding or withholding their assent to every projected law. The exact period at which this power was first fully recognised appears to be the 15th of Edward II., when, as we have seen, the authority of the lords ordainers was set aside, and it was enacted, that "matters to be established for the estate of the king and his heirs, and for the estate of the realm and of the people, should be treated, accorded, and established in parliaments by the king, and by the assent of the prelates, earls, barons, and the commonalty of the realm, according as had been before accustomed."

R. E.

Will you give us some account of the number of places which sent members to parliament in the reign of Edward I.?

SIR R. E.

In the twenty-third year of that reign it appears

that only one hundred and forty-five places returned members, of which thirty-five were counties; but in the twenty-fifth and twenty-sixth years of that reign, twenty-four additional cities and boroughs were represented.* From this period to the time of Edward VI. not more than thirty new boroughs were created, or, at least, claimed the right. The following are the members added, either by act of the legislature, or by charters, or restorations of charters, from the king, since the reign of Henry VII.†

		Members.		Members.
By King Henry VIII.	restored -	2	created -	53
Edward VI.	——— -	20	——— -	28
Queen Mary	——— -	4	——— -	17
Elizabeth	——— -	12	——— -	48
King James I.	——— -	16	——— -	11
Charles I.	——— -	18	——— -	0
Charles II.	——— -	0	——— -	6
		72		143
				72
Total restored and created in those reigns - -				215

Number of house of commons at the beginning of Henry the Eighth's reign - - -	298
Restored and created since, as before enumerated -	215
Number of the house of commons at the union -	513
Members for Scotland then added - - -	45
Members added on the union with Ireland - -	100
Number of the house of commons at present - -	658

* Heywood on Borough Elect. p. 38.
† Id. p. 44.

R. E.

Has the king still the power of granting the right to send burgesses to parliament?

SIR R. E.

The last instance in which that right was exercised was in the reign of Charles II., who granted a new charter to Newark; and the decision of the house of commons in that case recognised the right *; but since the act of union with Scotland it seems to be understood that the king can no longer grant the franchise. †

H. E.

Will you tell us what are the qualifications of electors?

SIR R. E.

With regard to the electors of knights of the shire, we have seen that there is a doubt whether, originally, they were the tenants *in capite*, or the whole body of freeholders. In practice, however, the freeholders at large soon became the electors; and by statute 10 Henry 6. the franchise is vested in those who have freehold to the value of 40*s.* by the year within the county. This, therefore, is still the general qualification, regulated in many particulars by a number of subsequent statutes. With regard to boroughs, the nature of their original franchises has given rise to much discussion

* Grey's Debates, vol. iv. pp. 297. 304.
† Introduction to Doug. Elect. Cases, p. 70.

amongst our antiquaries and lawyers. Some have supposed that it was vested in the tenants by burgage; others that it resided in the householders; others, again, that the body of the free burgesses were entitled to it; while some held that it was limited to the municipal magistracy. * I will not attempt to solve a question which has divided so many learned men, though I think I may say that the last opinion, notwithstanding its being supported by the subtle learning of Brady, seems highly improbable. It would, indeed, have been most beneficial if a general rule had been laid down on this subject, the want of which has given rise to infinite dissension and difficulty, the right of election depending entirely on the several charters, customs, and constitutions of the several places. But some limit has been put to these controversies by stat. 28 Geo. 3. c. 52., which makes the judgment of a committee of the house of commons on the subject final and conclusive for ever. In the discussion of these questions, it but too frequently happened that the judgment of the house proceeded entirely upon party motives, a disgraceful practice, which, in the course of the last reign, gave rise to Mr. Grenville's act, by which the examination of controverted elections is referred to a sworn committee of fifteen members, a regulation which has been found to be very beneficial.

* See Hallam, C. H. vol. ii. p. 384.

R. E.

You have told us what are the qualifications of the electors; will you now tell us those of the elected?

SIR R. E.

The knights of the shire must have a clear estate of freehold or copyhold, to the value of 600*l.* a year, and every citizen or burgess, to the value of 300*l.*, except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two Universities. Many persons are disqualified from sitting in parliament from other causes than the absence of this qualification, either by the law of parliament, or by particular statutes; as aliens, minors, the clergy, persons attainted of treason or felony, sheriffs of counties, and mayors and bailiffs of boroughs, for their respective counties or boroughs; all persons concerned in the management of any duties or taxes created since 1692 (except commissioners of the treasury), commissioners of prizes, transports, sick and wounded, wine licences, navy and victualling; secretaries, or receivers of prizes, comptrollers of the army accounts, agents for regiments, governors of plantations and their deputies, officers of Minorca or Gibraltar, officers of the customs or excise, clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney-coaches, hawkers, and pedlars;

all persons who hold any new office under the crown created since 1765; persons having pensions under the crown during pleasure, or for any term of years; and, lastly, contractors with government. And if any member accepts office under the crown, his seat is void; but he may be re-elected.*

R. E.

How frequently must the king call a parliament?

SIR R. E.

By a statute of Edward III. a parliament is to be held every year, or oftener if need be; but, whether by this act a yearly meeting of parliament, or a yearly election is intended, has been made the subject of much dispute. In practice, it was usual for our sovereigns to intermit parliaments for considerable periods. Thus Henry VIII. and James I. both governed for six years without convoking the representatives of the people. Charles I., as we may remember, called no parliament for twelve years, which gave rise to the 16 Car. 1. c. 1., whereby, if the king neglected to call a parliament for three years, the peers might issue writs, and in their default, the people might elect their representatives without the authority of a writ. This statute, however, was repealed by 16 Car. 2. c. 1.; but by 6 W. & M. c. 2. a new parliament was directed to be called within three years after the termination of the former. This

* Blacks. Com. vol. i. p. 175.

period was extended to seven years by statute 1 Geo. 1. st. 2. c. 38. As the mutiny bill, by which the army is kept on foot, and many of the supplies, are only voted annually, it has become indispensably necessary in modern times that parliament should meet once a year.

H. E.

I should be glad to know something of the way in which bills are brought into the commons.

SIR R. E.

Anciently, as we have seen, the commons presented their requests in the shape of a petition, and we are told by Hale, that from the reign of Edward III. till nearly the end of that of Henry VI., the petitions and answers were entered on the parliament rolls, and out of both, by the advice of the judges and others of the king's council, the act was drawn up conformably to the petition and answer, and generally entered on a roll, called the statute roll.* We have seen, that in the reign of Henry V., the commons complained of the alterations and diminutions which were thus made in their petitions, asserting it to be the liberty and freedom of the commons, that there should be no statute without their assent, considering that they had ever been *assenters* as well as *petitioners*.† From the reign of Henry VI.,

* Hist. of Com. Law, p. 14.
† Rolls of Parl. vol. iv. p. 22.

the custom appears to have obtained of presenting *bills*, that is to say, the law in the form in which it is intended to be passed.* At present, when a bill is intended to be brought in, if it be a private bill, a petition is presented to the house; if not, it is introduced on motion by a member. It is then read a first time, and the sense of the house is taken as to its reception; if not thrown out, it is afterwards read a second time, and if it still survives, it is *committed* or referred to a committee, where the particular provisions are canvassed, and the form of it is finally settled; upon this it is engrossed and read for the third and last time, and, if passed, it is carried up to the house of lords. If the projected law meets with the approbation of the peers, it passes through similar forms, and ultimately is presented for the royal assent. If the lords make any amendments, they are sent down with the bill for the concurrence of the commons, and if necessary, a conference takes place on the subject of the amendments between the two houses. It is, however, one of the most valued privileges of the commons, that the lords shall not make any amendments in *money bills*, a privilege which I will shortly explain.

H. E.

You will, perhaps, also give us some account of the other privileges of the commons.

* Hale, ubi sup.

SIR R. E.

The principal privilege of the commons as a body, is the right of originating all money bills, a privilege which may be traced to the original constitution of the house, which, as we have seen, was, in all probability, convoked at first for the purpose of raising supplies. It was natural, therefore, that as they were the party granting, the grant should originate with them, and accordingly, in the reign of Henry IV., we find the commons complaining, that the lords had recommended the continuance of a subsidy. * From this period the commons have uniformly claimed and exercised this privilege; so jealous, indeed, have they shown themselves of any infringements upon it, that they have excluded the lords from even offering an amendment of a money bill.

Another privilege of the commons, scarcely inferior to that of originating money bills, is the power exercised by them from a very early period, of impeaching great offenders at the bar of the house of lords. The earliest instance of this parliamentary accusation appears to have taken place in the reign of Edward III, when several merchants of London, impeached for certain misdemeanors, were imprisoned during the king's pleasure, and fined. † Another instance occurs in the following reign, when Michael de la Pole,

* Rolls of Parl. vol. iii. p. 611.
† Id. vol. ii. p. 323. Hatsell, vol. iv. p. 50.

Earl of Suffolk, was impeached of several crimes.* "All the articles," says Walsingham, "were so fully proved, that the Earl of Suffolk could not deny them; insomuch, that when he stood upon his defence, he had nothing to say for himself; whereupon the king, blushing for him, shook his head, and said, Alas! Alas! Michael, see what thou hast done!" Several other cases of impeachment occur during the same reign; but the practice afterwards fell into disuse, probably, in consequence of the introduction of bills of attainder, and it was not until the reign of James I., that it was revived in the case of Sir Giles Mompesson, the great monopolist; since which period it has been resorted to upon several occasions.

R. E.

What kind of offences have been made the subject of impeachments?

SIR R. E.

During the fourteenth and fifteenth centuries, it was the practice for the commons to proceed by impeachment, in cases of misdemeanors committed by persons employed under the crown, of misconduct of the judges, and of treason and treasonable practices †; but in later times, the proceeding has been confined to cases of great misdemeanors.

H. E.

According to Blackstone, a commoner cannot

* Rolls of Parl. vol. iii. p. 216. † Hatsell, vol. iv. p. 63.

be impeached before the lords for any capital offence, though a peer may be impeached for any crime.

SIR R. E.

This certainly appears to be a mistake; for in the case of Sir Adam Blair and others, who were impeached for high treason, the lords determined that they had power to proceed in the impeachment, although the parties were commoners. †

H. E.

By whom is judgment pronounced in cases of impeachment?

SIR R. E.

By the whole house of peers, who pronounce whether the offender is guilty or not guilty.

H. E.

A great question, I believe, was raised in Charles the Second's time, as to the power of the king to grant a pardon, so as to prevent an impeachment.

SIR R. E.

It was raised in the famous case of the Earl of Danby, and gave occasion to a clause in the act of settlement, passed soon after the Revolution (12 & 13 W. 3. c. 2.), by which no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.

The power of impeachment must, certainly, be

* Hatsell, vol. iv. p. 260. † 14 Lords' Journal, p. 260.

esteemed one of the most valuable and efficient of the many privileges with which the commons are invested. The right of enquiring into, and animadverting upon the conduct of the king's ministers, would, in earlier times, have been of little importance, had the censure of the house been merely a *brutum fulmen*. At the present day, when, in consequence of the growth of public opinion, the fear of exposure and publicity is in itself almost sufficient to deter the servants of the crown from malversation or gross misconduct, the right of impeachment is become a less useful privilege. But should any minister be bold enough to contemn the awful voice of public opinion, and to venture upon courses corrupt or unconstitutional, the solemn call of the nation for justice may still be heard in the impeachment of the offender by the commons of Great Britain.

Privilege of speech is another most important right of the commons, claimed by them at a very early period, and boldly asserted, as we have seen, even under the Tudors. This grand privilege is fully recognised by the bill of rights (1 W. & M. st. 2. c. 2.) as being one of the liberties of the people; that the freedom of speech and debates, and proceedings in parliament, ought not to be impeached or questioned in any place out of parliament. This privilege, however, only extends to what is said by a member in his place, and, therefore, if he afterwards publishes his speech, in

which matter defamatory of an individual is contained, he cannot shelter himself under his privilege. * The person also of a member of parliament is free from arrests.

H. E.

Not on a criminal charge, I believe?

SIR R. E.

No; there is no instance of a member claiming the privilege of parliament, to withdraw himself from the criminal law of the land, to which they have always been held amenable, like every other subject. † They are, likewise, within the operation of the laws with respect to bankrupts ‡, and neither their lands nor goods are now privileged from being taken in execution, though such a privilege existed before the stat. 10 Geo. 3. c. 50. Such are the privileges and immunities with which the dignity and security of parliament are fenced.

Before I conclude, I wish to say a few words on the peculiar character of the house of commons, and the effect which it has had on the welfare and happiness of this country. You cannot have failed to observe, in the course of the historical view which we have taken of the rise and progress of our constitution, that our liberties have been matter of gradual acquisition, and that as circumstances justified the demand, new limitations of the prerogative have been called for by the people.

* R. v. Creevey, Maule and Selwyn's Rep. vol. i. p. 273.
† Hatsell, vol. i. p. 197. ‡ 6 Geo. 4. c. 16.

In fighting this great fight, the commons, from the earliest period of their existence, have proved themselves the faithful soldiers of the nation; chosen from the people, they have made the people's cause their own; and though often seduced by the blandishments of power, and sometimes overawed by its frowns, they have never wholly forgotten their pure popular character. In the different periods of our history, we have seen how much they have varied in character: — originally humble petitioners; then respectful complainants; then acknowledged sharers in the government: under the Tudors, submissive servants; under the Stuarts, bold and vigilant assertors of popular rights. Under all these changes, the commons of England have been the barrier between the people and a despotic throne.

Of the character of the house of commons in our own day, I shall say very little; nor is it altogether within the scope of our design to moot the great question of parliamentary reform, upon which, however, I entertain, as you know, a firm and decided opinion. Without attempting to define the nature and extent of that reform, I am clearly of opinion that an extension and equalization of the elective franchise is a measure both of justice and expediency; and I am sure that no man who has studied the history of our constitution with unprejudiced feelings, will discover anything like peril in the temperate adoption of such a measure.

CONVERSATION XIV.

THE COURTS OF JUSTICE.

Origin of the superior courts of law. — Curia regis. — Justices itinerant. — The court of exchequer. — Of common pleas. — Of king's bench. — Courts of equity. — Inferior courts. — County court. — Court baron. — How justice is distributed. — Progress of a suit at law. — Practice of the court. — Doctrine of arrests. — Courts of error. — Province of the jury. — Mode of proceeding in criminal cases.

R. E.

I HOPE that you intend to make it part of our labours to enquire into the origin and formation of our courts of justice, and to give *me* some idea of the way in which justice is distributed.

SIR R. E.

Unless Hugh will undertake to satisfy you, I will make the attempt.

H. E.

I had rather, if you please, hear your account of the matter.

SIR R. E.

Let us then proceed. You may remember that,

at the commencement of our enquiries * I spoke of the great councils which used to assemble under the Norman kings, and with the assent of which the sovereign not only transacted matters of state, but likewise administered justice. When the council was assembled for the latter purpose, it was known by the appellation of the *curia* or *aula regis*, from its being held in the king's palace. In this court the causes of the suitors were heard, before the king himself, or before one of the members of the council, who was called the *chief justicier*, who, in the king's absence, appears to have been invested with the office of vicegerent. Other members of the council, under the name of *justiciæ*, or *justiciarii*, were sometimes associated with the chief justicier.

R. E.

What kind of causes were determinable in the *aula regis?*

SIR R. E.

Both civil and criminal; but it is probable that only cases of some importance were carried before that high tribunal. As a fine was demanded † before the party could have justice done him in the king's court, and as in each county there were courts for the distribution of justice, it was, probably, only when, through the influence of some powerful noble, the suitor in the county court was

* See ante, p. 11. † See ante, p. 33.

unable to obtain redress there, that he resorted to the *aula regis*.

H. E.

I believe that originally the justices itinerant, or *in eyre*, were members of the *aula regis*.

SIR R. E.

It seems that they were. When the pleas brought before that court became too numerous to be conveniently despatched, certain of the *justiciers* were appointed to go *iters*, or circuits, through the realm, with powers to determine causes in the same manner as in the *curia regis*. They had also authority to assess tallages upon the king's towns. * The exact period at which the justices itinerant were instituted is not known. It is conjectured, by Lord Lyttelton, that they owe their origin to Henry I. †, and it is certain that they were appointed in the 20th of Henry II.† In these justices itinerant we trace the predecessors of our present justices of assize, who, twice in each year, are despatched to administer justice in every county.

It is natural to suppose that, as the business of the *curia regis* increased, some classification and distribution of it would take place. Accordingly we find that at a very early period the cases relating to the king's revenue were carried into the

* See ante, p. 21. † Vol. iv. p. 271.
‡ Madox's Exch. vol. i. p. 123.

court of exchequer, which was a sort of subaltern court to the *curia regis*, formed on the same model, and, like it, held before the king himself, or some of the barons of his council.*

We have seen that causes between subject and subject, or *common pleas*, as they were termed, came within the cognizance of the *aula regis*; but in the same manner as the consideration of matters relating to the king's exchequer was gradually drawn exclusively before the court of exchequer, so the examination of *common pleas* was also appropriated to a separate court, which was called the court of common pleas, or the common bench or bank. There are traces of this division having taken place during the reign of Henry II.†; but it is clear that such a separate court existed when the great charter was granted (17 John); for, by the terms of that charter, common pleas shall not follow the person of the king, but shall be held in a certain place. Before this period, the *aula regis*, in which common pleas had been determinable, being usually held before the king himself, followed the person of the king, in his various progresses through the country, to the great inconvenience of the suitors. Notwithstanding the division of the courts of exchequer and common pleas from the *aula regia*, that court still continued to take cognizance of causes between subject and subject, and retained its old exclusive

* Madox's Exch. vol. i. p. 154. † Id. c. xix.

jurisdiction over criminal matters; the appellation of *aula regia* being changed to that of the *king's bench.*

H. E.

Had the court of chancery its origin at the same time as the courts of common law?

SIR R. E.

No. As a court of equity, distinguished from a court of common law, it was of much more gradual growth. Originally, the chancellor was one of the king's officers, intrusted with the keeping of the royal seal; and during the existence of the *aula regia*, the chancellor used, as we have seen, to issue the writs entitling parties to sue in the king's court. That court exercised an equitable as well as a legal jurisdiction over the causes brought before it; and it was not till some time after its distribution into the several courts of king's bench, common pleas, and exchequer, that the cognizance of cases of equity or conscience was granted to the chancellor. It is probable that, as that officer was in these early times an ecclesiastic, the king used to refer to him for his advice and assistance in the determination of cases brought before him, to which the rules of the courts of common law were inapplicable, or, if applied, would have caused injustice to the parties. At length a reference to the chancellor would become customary in all such cases, and hence

the origin of that extensive jurisdiction which the court of chancery at present possesses.

H. E.

I never properly understood the distinction between equity and common law: will you be good enough to explain it?

SIR R. E.

It is not a very easy task; but I will attempt it. In certain cases, in which the technical rules of law prevent a person who has been injured from obtaining the redress to which, in *equity* or conscience, he is entitled, the court of chancery will take cognizance of the case, and compel the other party to do justice. For the most part, therefore, equity only interferes where the common law affords no remedy. The principal cases in which relief may be had in equity, are cases of *accident* and *mistake*; of *account*; of *fraud*; of *specific performance of agreements*; and of *trusts*. I will select the last two heads, as affording the best illustration of the distinction between the courts of equity and of common law. If you and I enter into an agreement, and you refuse to complete it, at common law, I can only bring an action against you for the damages which I have sustained in consequence of your refusal to observe your contract; but the courts of common law have no means whatever of compelling an actual and specific performance of the agreement. But if I file a bill

against you in the court of chancery, I may obtain a decree for a specific performance, which unless you choose to obey, the chancellor will send you to the Fleet prison. So in the case of trusts, if I were to convey an estate to A to the use of A, in trust for B, the courts of common law would regard A as the legal owner; and B must resort to equity for a remedy, if A refuses to perform the trust. The mode of proceeding and practice of the courts of equity and common law differ as widely as their principles. In equity, a single judge determines upon facts, without the intervention of a jury. In equity, there are no *vivâ voce* examinations of witnesses, as in the courts of common law. At common law, a party can never be a witness in his own cause. In equity, the defendant is always compelled to answer the complaint of his adversary upon oath.

R. E.

But why cannot the same court administer both law and equity?

SIR R. E.

I really do not know. I should have thought it not impossible.

R. E.

You have only spoken of the great courts of justice: are there not a number of inferior courts?

SIR R. E.

The most important of the inferior courts, is

the county court, which, before the institution of the justices in eyre, and of assize, was probably the principal tribunal for the administration of justice. Before the conquest, the bishop and ealdorman, or earl, used to preside in this court; but the bishop was prohibited from attending by a law of William the Conqueror. As the barons were originally the judges under the king, in the great council of the nation, so the freeholders of the county are still the judges in the county court, the sheriff sitting there merely as a ministerial officer. This court can only determine cases where the debt or damages to be recovered are under forty shillings, unless permission be given by writ of *justicies* to proceed as if the action had been brought in one of the superior courts at Westminster. Besides the county court, there is the *court baron*, or the court of the lord of a manor, in which the freeholders of the manor are the judges, like the freeholders of the county in a county court; there are also a number of other inferior jurisdictions, the explanation of which would occupy too much of our time.

R. E.

Now that you have explained the origin of our courts of justice, you will, perhaps, say a few words as to the manner in which justice is distributed by them?

SIR R. E.

The court of king's bench takes cognizance of

all personal actions, as they are termed; that is, of all actions not brought for the recovery of land specifically, and also of all criminal proceedings. The common pleas has the same power of trying personal actions, but without the power of trying criminals. This court, however, has the exclusive right of determining *real* actions, that is, actions brought for the recovery of lands. I should tell you, at the same time, that by the fictitious remedy of ejectment, all the courts, in fact, possess the power of trying the title to lands in ordinary cases. The exchequer is, properly, the king's revenue court, but any personal actions may be tried there; and there is also an equity side of that court, in which the proceedings are analogous to those of the court of chancery. As the number of causes to be tried in the country is far too great to be determined by these three courts, and as it would be most inconvenient to bring all the parties with their witnesses to Westminster to try them, the institution of justices of assize was established, as we have seen, very early in our history, for the purpose of facilitating the distribution of justice. Twice every year the judges receive commissions to proceed through the different counties, to hear and determine the various actions which have been brought in the courts of Westminster, and which are ripe for trial, and also to try the prisoners confined for offences, and so to deliver all the gaols. The

sittings of these judges are termed the assizes, and causes tried before them are said to be tried at *nisi prius*, from these words being used in the writ to the sheriff for summoning the jury.

R. E.

I should like to know something of the history of a law-suit, and what is the course of proceeding.

SIR R. E.

Very well: I am the owner of the garden here:—you, conceiving you have a right to it, walk in and begin to dig it according to your pleasure. Of course, I go to my attorney and to law. He sues out a writ from the king's bench, called a *latitat*, by which you are required to make your appearance in court on such a day, which means, that you are to cause a memorandum to be filed, that you have appeared by your attorney, which shows, that you are ready to answer my complaint. My attorney now goes to his special pleader, as the gentleman is termed, and gets him, for half a guinea, to draw a declaration, which is a formal technical statement of the injury of which I complain, but in general so disguised in professional phrases, that you would scarcely know what it means. This document is delivered to your attorney, whose duty it is on your behalf to plead to, or answer it, within a certain time, allowed by the rules of the court. Accordingly, he goes to his special pleader, and desires him to draw the

plea, and in this plea the defence upon which you rely for your justification is stated. Sometimes, a general answer only is sufficient, as that you are not guilty of the trespasses with which I have charged you; sometimes, according to the form of action, and the nature of the defence, the plea must state the circumstances in detail upon which the defendant relies, and this is termed a special plea. Upon the plea being delivered to my attorney, he prepares a *replication*, and so each party goes on answering the other, till they come to *issue*, that is, till they arrive at some one fact, asserted on the one hand, and denied on the other. The case is then ripe for trial, and writs are issued to the sheriff of the county, in which the cause is to be tried, commanding him to have a jury ready to try it at the next assizes. The whole of the proceedings are then copied out upon a parchment, which is called the *nisi prius* record, and this parchment is sent down to the assizes. In its regular order, the cause comes on to be tried before the judges; witnesses are called, and documents are produced on both sides, in support or denial of the points in issue. My counsel begins, and, after an eloquent harangue, calls his witnesses. Your counsel answers him, and calls his. My counsel replies. The judge sums up the evidence, from which it most plainly appears, that you had no right in the world to dig up my garden. The jury consult together for five minutes, and find a

verdict for me with 100*l.* damages. The beginning of the next term my attorney signs judgment, (which is supposed to be the solemn sentence of the court in which the action is brought) for that amount, taxes the costs (that is, gets the officer of the court to compute the amount of expense to which the suit has put me), and issues a writ of execution. That writ entitles me to take either your body and put you in prison, or your goods and sell them, or half the profits of your lands and your goods. I prefer your body, and the sheriff's officer consequently takes you to —— gaol, where you remain during my will and pleasure, or until you pay me my damages and costs; and now you see the fatal effects of trespassing.

But I have supposed above, that all the facts and the pleadings on both sides were correctly and technically stated. If they were not so, the other party, instead of answering the incorrect pleading, may demur, that is, may appeal to the court in which the action is brought, whether the particular pleading is sufficient to support the demand or defence, as the case may be. The other party, then, *joins in demurrer*, and the question comes on to be argued before the court, and, according to their decision, the plaintiff recovers his demand, or his proceedings are set aside.

R. E.

If all the trials take place before the judges at

the assizes, what have the courts at Westminster to do?

SIR R. E.

Plenty: one great branch of their business is, determining whether or not, in certain cases, it is proper to grant new trials, where there has been some mistake or oversight in the judge or jury at the assizes. Then many cases, in which difficult points of law have arisen, are reserved for the opinion of the court, in the shape of special cases, or special verdicts, as they are termed. In addition to this, much of their time is employed in hearing motions, that is, in listening to the application of counsel who are instructed to obtain the order of the court in various stages of a cause, for various purposes, a great deal of what is called the practice of the court being thus carried on. The sittings of the whole court are termed sittings in *bank*, and are usually held every day during the four terms of Hilary, Easter, Trinity, and Michaelmas.

R. E.

You put me in prison for the damages and costs which I would not pay you; but could you not have arrested me and sent me there at the commencement of the action?

SIR R. E.

No; it is only where there is a *debt* owing, for which the action is brought, that a man can be

arrested in the first instance, unless in some particular cases, by an order from a judge. Where the action is brought to recover a *debt*, and not merely for *damages*, as a compensation for a wrong done, or a breach of contract, the writ of *latitat* authorizes the sheriff to take the body of the debtor, until he gives bail, that is, until he finds two substantial householders, who undertake to pay the money which the plaintiff shall recover, or to render up to prison the body of the defendant. But as this cannot be done immediately, the sheriff may take a bond from the defendant and his sureties for the due finding of the bail I have mentioned above, and on giving this bond, the sheriff is bound to release the defendant.

R. E.

Suppose, in my case, that the court has given an incorrect judgment, have I any remedy?

SIR R. E.

In general where a court gives a wrong judgment, and the error appears on the face of the proceedings, a writ of error lies to a superior court; that is, the erroneous record is removed, in consequence of a writ issued for that purpose, into the superior court, and there, the errors being pointed out, they are discussed, and the judgment of the court below is affirmed or reversed, according to the opinion of the superior court. In some cases a judgment may be carried succes-

sively before two or three courts for their revision, the ultimate appeal being to the house of lords.

R. E.

In these cases is the cause tried over again in the superior court?

SIR R. E.

No. There can be no dispute as to the facts in a court of error. They are only to decide as to the law arising upon the facts stated in the record. It being, therefore, merely a question of law, there is no new trial, and no intervention of a jury.

R. E.

You will, perhaps, say a few words as to the office and duties of a jury.

SIR R. E.

The general rule is, that a jury is to judge of the facts only, and that all points of law arising on a trial, are within the jurisdiction of the judge; but this rule must be understood with very great qualifications. Let us return to our case of trespass. I sue you for trespassing upon my garden; you plead a licence from me to do what you did. Now here two questions arise: first, Whether, in fact, I did grant you the licence? secondly, Whether that licence is sufficient to justify you in what you did? According to the above rule, the jury are only to say whether or not such a licence was, in fact, given, and then the judge will declare

the effect of it. But as the jury alone can give the damages, it is necessary for them to come to a conclusion as to the validity of the licence; and in order to lead them to a right conclusion, the judge states to them his opinion on the matter of law. This opinion they are bound, if they think it correct, to follow, though they cannot be compelled by the judge to adopt it. Should they refuse to recognize it, and give a verdict contrary to it, the only consequence would be, that the court would grant a new trial. In effect, therefore, the jury are judges both of law and fact, *under the direction of the judge*, and subject to the revision of the court above. I shall have occasion to recur to this subject when we come to speak of the law of libel.

R. E.

As you have now given me some idea of a civil action, I should like to know what is the form of a criminal proceeding.

SIR R. E.

Hugh has stolen one of my horses.

H. E.

Let it be Surrey.

SIR R. E.

Hugh has stolen Surrey out of my stable. I go to my neighbour Sir Edmondsbury Godfrey, the magistrate, who, on my information, grants a warrant against Hugh; it is placed in the hands of

the constable, Job Dogberry, who catches Hugh, and brings him before Sir Edmondsbury. I appear, and prove such facts upon oath, as are sufficient to satisfy the magistrate that it is his duty to commit the prisoner. He is, accordingly, committed to the county gaol, where he remains till the judges of assize come. The grand jury, consisting of more than twelve, and less than twenty-four, of the principal gentlemen of the county, being assembled, an indictment, that is to say, an accusation written on parchment, and couched in technical language, charging Hugh with the commission of this offence, is presented by my attorney to the grand jury, and all the witnesses for the prosecution are brought before them. Hugh and his witnesses, however, are not allowed to appear, and the grand jury only hear the evidence for the prosecution, and if satisfied that there is on that testimony a proper case to go to trial, they find *a true bill*; if not, they find *no true bill*, and Hugh is discharged. The finding of a *true bill* has only the effect of putting Hugh upon his trial, before a petty jury, that is a jury of twelve. Accordingly, he is placed in the dock and *arraigned*, that is, the indictment is read to him, and he is asked whether he is guilty or not guilty. His plea, which is not offered by him in writing, is taken down by the officer of the court, and he is permitted to *challenge* the jury, that is, to urge certain objections to their competency to sit on his

trial. A proper jury being obtained, the trial then commences. The counsel for the prosecution states the case to the jury, and calls his witnesses. Hugh then makes his own defence, for in cases of felony, the prisoner's counsel is not allowed to address the jury,—a relic of a barbarous age, defended by many who ought to rise superior to prejudice. Having finished his statement (a very ingenious one, but, I regret to add, totally false), Hugh calls his witnesses, who are not believed, and upon the judge's summing up, the jury find a verdict of guilty. The judge then, putting on his black cap, passes sentence of death upon poor Hugh, who is accordingly left for execution.

CONVERSATION XV.

THE LIBERTY OF THE PRESS.

History of the restrictions on the press. — Principle of a free press. Law of libel. —Mr. Fox's act. —Public opinion.—Conclusion.

H. E.

We are both of us very desirous of hearing you say something as to the history of the restrictions on the press in England, and the policy of such restrictions.

SIR R. E.

It is difficult to ascertain the precise period at which the crown assumed a control over the press; but it seems probable, that the authority was originally claimed and exercised in cases of heretical publications. The attempt to suppress Tyndale's version of the Bible was, perhaps, one of the earliest attacks upon the freedom of the press. In the year 1530, the king, by proclamation, prohibited that work from being imported, sold, or kept, and several persons were condemned to the flames for infringing this command.* In the course of the

* Lingard's Hist. vol. vi. p. 365. In 1526 there is an instance of prohibiting the publication of a book, Fox's Martyrs, p. 290. Sir W. Blackstone's Rep. vol. i. p. 114.

same reign (25 Hen. 8. c. 15.) a statute was passed for the purpose of regulating the importation of books from abroad, and authority was given to the chancellor, treasurer, and the two chief justices, or any two of them, to regulate the prices of books printed in this country. Under this statute, an injunction issued in 1539, prohibiting the importation of books from abroad*; but as yet there appears to have been no *general* power assumed by the crown of prohibiting or licensing books. In 1555 (2 & 3 Philip and Mary), another proclamation issued against heretical books; † and at the close of that reign, an attempt was made to place the press entirely at the mercy of the crown. In the year 1558, a bill was introduced into the house of lords under the title, "That no man should print any book or ballad, &c. unless he be authorized thereunto by the king and queen's majesty's licence, under the great seal of England." "What fate this bill would have had in the house of commons," say the compilers of the old parliamentary history‡, "is uncertain, for on the third reading, on the 16th of November, the clerk breaks off the lords' journal very abruptly. This must be occasioned by the desperate state the queen was then in, who died the next day, Nov. 17." Hitherto, therefore, the crown does not appear to have assumed a general jurisdiction over the press; and

* Sir W. Blackstone's Rep. vol. i. p. 115. † Ibid.
‡ Vol. iii. p. 354.

the above attempt to confer such an authority by statute, would show that it was not at that period considered one of the royal prerogatives.

During the reign of Elizabeth, further restrictions were imposed, and by a decree of the Star-chamber in 1585, every book is to be licensed, nor shall any one print any book, work, or copy, against the form or meaning of any restraint contained in any statute, or in any requisition made by her majesty, or her privy council, or against the true intent and meaning of any letters patent, commissions or prohibitions under the great seal, or contrary to any allowed ordinance set down for the good government of the Stationers' company.* By order of the Star-chamber, also, printing was allowed only in London, Oxford, and Cambridge.†

It was not to be expected that the successor of Elizabeth would refrain from exercising his sovereign power over the press. Accordingly in 1623, James, by a proclamation, reciting the above decree of the Star-chamber in the time of Elizabeth, and alleging that it had been evaded by printing beyond sea, enforced the observance of the same.‡

R. E.

I suppose that the power of the press must have been rapidly increasing at this time.

* Strype's Life of Arch. Whitgift.
† Knightly's case, 1 St. Tr. 1263.
‡ Rymer, vol. xvii. p. 522.

SIR R. E.

It was, no doubt, gradually becoming greater, owing to the more general diffusion of education amongst the people at large, and it was, therefore, regarded by the crown with increased jealousy. During the disputes between Charles and his parliament, the press was put into frequent requisition by both parties, though the court endeavoured, by a strict observance of the licensing system, to prevent their enemies from availing themselves of this powerful engine. We are told by Rushworth, that in 1637 the licensing of all new books "was in the power of the archbishop of Canterbury, and his substitutes and dependents, who used that strictness, that nothing could pass the press without his or their approbation, but the authors, printers, and stationers must run a hazard of ruin." Not only was the publication of *new* books without licences forbidden, but a decree was made in the Star-chamber, that no person should presume to print *any book or pamphlet whatsoever*, unless the same should be first licensed by the archbishop of Canterbury, or the bishop of London, or by the chancellor or vice chancellor of the universities within their limits; and that no books whatsoever should be reprinted, though formerly licensed, without a new licence; and that if any person, not an allowed printer, should presume to set up a press for printing, or work at any such press, he should be set in the

pillory, and whipt through the city of London.* It is a singular fact, tending to show the inclination of Laud, and, perhaps, of Charles himself to catholicism, that Fox's Book of Martyrs should have been amongst the works to which a new licence was denied.† This rigour was not, however, of very long continuance; for we find Clarendon complaining that in the year 1640 the presses "were at liberty for the publishing the most invective, seditious, and scurrilous pamphlets, that wit and malice could invent." ‡

H. E.

On the establishment of the commonwealth, the press, of course, became free.

SIR R. E.

I am sorry to say that you are mistaken. The benefit of an unshackled press was not yet acknowledged, and the parliament assumed all the powers in this respect which were formerly claimed by the Star-chamber. By an ordinance of 28th Sept. 1647 §, it was ordained that selling books, pamphlets, &c. (except the same were licensed by both or either house of parliament, or by some person authorized by parliament), should be punished with fine and imprisonment. Some further regulations were made shortly afterwards, by an ordinance of 20th Sept. 1649. ‖ In the latter

* Rushworth, vol. ii. p. 450. † Ibid.
‡ Clarend. Hist. vol. i. p. 355. § Scobel's Coll. p. 134.
‖ Scobel's Coll. p. 88. renewed 7th Jan. 1653.

ordinance, there is one provision which savours as strongly of oppression as any proclamation in the worst time of the Stuarts. All ballad-singers were directed to be apprehended, and whipped as common rogues; a harsh and cruel enactment, which spoke little in favour of the popularity of the new government. Indeed, the conduct of the long parliament with regard to the press was altogether at variance with the principles upon which a commonwealth ought to be founded. The idea that a free press is essential to the well-being of a state, appears never to have been entertained by them, and, accordingly, they persecuted their literary adversaries with the same zeal which Laud had so lately displayed against the friends of freedom. In their anxiety for the religious tenets of the people, they even went so far as to forbid a translation of the Koran, which was about to be published, fearing, no doubt, that all the independents would be converted into faithful followers of Mahomet. *

R. E.

It is scarcely to be expected that, on the restoration, the press should be left unfettered.

SIR R. E.

Nor was it. In 1662 (13 & 14 Car. 2. c. 33.) an act was passed "for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating

* Journals, Mar. 19, 21, 1649, cited 3 Godwin, 343.

of printing and printing-presses," the provisions of which were similar, in many respects, to those of the ordinances of parliament on the same subject. During the reign of Charles II., it seems to have been a current doctrine with our lawyers, though certainly it was not altogether accurate, that from its introduction into England, the regulation of the press had been a branch of the prerogative *; and, accordingly, some very dangerous doctrines were broached by the judges, with regard to the law of libel and the seizure of seditious books. Upon the trial of one Harris for a libel, chief justice Scroggs told the jury, "that all the judges of England had declared unanimously, that all persons that do write, or print, or sell, any pamphlet that is either scandalous to public or private persons, such books may be seized, and the person punished by law: that all books which are scandalous to the government may be seized, and the persons so exposing them may be punished." You will observe, that this strong position is laid down after the expiration of the licensing act, in 1679, and is offered as the doctrine of the common law. The jury who tried Harris appear to have been dissatisfied with this exposition of the law, and, at first, they found a verdict of guilty of selling the book, "at which there was a very great and clamorous shout," whereupon the chief justice said,

* See Atkins's case, Carter's Rep. 91; Comp. of Stat. v. Seymour, 1 Mod. Rep. 258.

"I am sorry you gave countenance to this cause so much, as to stir from the bar when the evidence was so full, and when I told you plainly, not only my opinion, but likewise that of all the judges of England, that selling this book was an offence at the common law, for which they ought to be punished, and yet with your scruples you give the party (with their halloos and shoutings) to take advantage; though you did mean upon the matter the same thing then you do now; yet you see, upon every little occasion, when a thing shall seem to thwart the government, how ready they are to send up their loud hallooings." * These indecorous manifestations of public opinion have frequently been found a wholesome medicine for the court.

We cannot be surprised at finding the licensing act, which had expired in 1679, revived in the first year of James the Second's reign. It might, however, have been expected that, on the Revolution, the odious and dangerous power thus intrusted to the government would be finally abolished; but it was thought expedient to continue it for some years longer, and it was not until the year 1694, that, on the expiration of the last licensing act, the press became ultimately free. Several attempts were, indeed, made during the same reign to revive the restrictions; but, being strongly resisted, they all failed.

* State Trials, vol. vii. p. 931.

H. E.

As you have now traced the history of the press, will you be good enough to state the principles upon which the system of a free press is to be defended?

SIR R. E.

Those principles are very few and simple. With regard to the licensing of the press, the matter is quite clear. The great utility of the press as a political engine, is that it serves to expose the false principles and the false measures of government; but if under the absolute control of that government, its utility must, of course, immediately cease. The matter is really too obvious to bear any discussion. However, let us go a little farther. A government is either good or bad. Now does a good government run as great a risk of being injured by a licentious press, as a bad government of being corrected by an honest press? I, for one, can never believe that, where the throne is "established in righteousness," it can be shaken by the unfounded invectives of seditious writers; while, on the other hand, I have the strongest faith in the efficacy of a free press, in exciting and strengthening opposition to the illegal or unconstitutional measures of a government. The balance of advantages, therefore, seems to me most clearly in favour of a perfect liberty of the press,

unrestrained by any system of licensing. In what manner, and to what degree it may be proper to correct the licentiousness of the press by punishing, not preventing the publication of seditious and libellous books, is altogether another question; and though the law of libel, as frequently administered in former days, was often injurious to the cause of freedom, yet it seems highly necessary, that there should be some check upon the use of seditious and opprobrious language. To canvass the measures of government with decency and moderation, is, under our present system of libel law, perfectly justifiable. It is only when a writer transgresses the just boundaries of fair argument and observation, that he becomes amenable to the law. The vagueness and generality of our libel law in this respect, may, sometimes, afford an opportunity, to an ill-disposed judge, of misrepresenting the character of a fair and honest publication; but it is seldom that a jury will be found to concur in the same view.

H. E.

Formerly, I believe, the judges used to make the jury confine themselves to the fact of *publication* merely, and used to take upon themselves to declare whether the writing was libellous or not.

SIR R. E.

The State Trials are full of cases of that kind. The court having secured the judges, were thus

sure of a conviction for the libel. This practice, which arose out of a misconception of the relative duties of the judge and the jury (the jury in this, as in other cases, having a clear right to return a general verdict of guilty or not guilty), was put an end to by statute 32 Geo. 3. c. 60., usually called Mr. Fox's Act, by which the jury, in cases of indictments for libel, may give their verdict upon the whole matter in issue; and shall not be required or directed by the judge to find the defendant guilty merely on the proof of the publication. The judge, however, may, according to his discretion, give his opinion to the jury on the matter, in the same manner as in other criminal cases.

The effects of a free press in the present state of society, when there are so very few persons in the country incapable of reading, are, without doubt, most extensive and important. The celerity with which information of every kind is wafted from one extremity of the kingdom to the other, and the vast number of persons to whom that information is imparted, have added greatly to the influence of public opinion, which has thus a thousand channels for expressing itself. I could wish that the great privileges which a free press confers upon us were never abused to sinister purposes; but as it would be vain to expect that such an institution should be perfect, we must be content to suffer occasionally from its licentiousness, in

consideration of the vast benefits which we derive from its legitimate use.

Our task is now concluded — at all events, for a season. I could have wished it more perfectly executed; but you will not, I trust, have failed to gather some facts of importance, and much matter for future reflection.

THE END.

LONDON:
Printed by A. & R. Spottiswoode,
New-Street-Square.

MODERN PUBLICATIONS,

AND

NEW EDITIONS

OF

VALUABLE STANDARD WORKS,

PRINTED FOR

LONGMAN, REES, ORME, BROWN, & GREEN,

LONDON.

CONVERSATIONS on CHEMISTRY; in which the Elements of that Science are familiarly explained and illustrated by Experiments. In this Edition, a Conversation has been added on the Steam Engine. The Tenth Edition, revised and improved, in 2 Vols. 12mo. with plates by Lowry, 14*s.* Bds.

By the same Author,

1. CONVERSATIONS on NATURAL PHILOSOPHY; in which the Elements of that Science are familiarly explained and adapted to the comprehension of Young Pupils. 4th Edition, 10*s.* 6*d.* Bds., with 22 Engravings by Lowry.

2. CONVERSATIONS on POLITICAL ECONOMY; in which the Elements of that Science are familiarly explained. The 5th Edit. 12mo. 9*s.* Bds.

CONVERSATIONS on ALGEBRA; being an Introduction to the First Principles of that Science. By WILLIAM COLE. In 12mo. Price 7*s*. Bds.

CONVERSATIONS on MINERALOGY; with Plates, engraved by MR. and MISS LOWRY, from Original Drawings, comprising upwards of 400 Figures of Minerals, including 12 beautifully coloured Specimens. 2d Edit. in 2 Vols. 12mo. 14*s*. Bds.

CONVERSATIONS on the EVIDENCES of CHRISTIANITY: in which the leading Arguments of the best Authors are arranged, developed, and connected with each other: for the Use of Young Persons and Theological Students. In 1 Vol. 12mo. Price 8*s*. Bds.

CONVERSATIONS on BOTANY, with Twenty-one Engravings, the 5th Edit. enlarged, in 1 Vol. 12mo. Price 7*s*. 6*d*. plain, or 12*s*. coloured.

CONVERSATIONS on the ANIMAL ECONOMY. By a PHYSICIAN. In 2 Vols. 12mo. illustrated by Plates, &c. price 16*s*.

"Mrs. Marcet's admirable Conversations on Chemistry, Natural Philosophy, and Political Economy, are well known and much esteemed by the public. The present volumes are in imitation of that accomplished Lady's Writings.

"The Author, in our opinion, has succeeded in producing, for the instruction of the general reader, and even the learned, an accurate, interesting, and highly amusing account of the Animal Economy."—*Jameson's Philosophical Journal.*

CONVERSATIONS on MYTHOLOGY. Price 5*s*. Bds.

GIBBON'S HISTORY of the DECLINE and FALL of the ROMAN EMPIRE; for the Use of Families and Young Persons. Reprinted from the original Text, with the careful Omission of all Passages of an irreligious or immoral Tendency. By THOMAS BOWDLER, Esq. F.R.S. S.A. In 5 Vols. 8vo. Price 3*l*. 3*s*. Bds.

By the same Author,

The FAMILY SHAKSPEARE; in which nothing is added to the original Text; but those Words and Expressions

are omitted, which cannot with propriety be read aloud in a Family. 10 Vols. Royal 18mo. 3*l.* 3*s.* Bds. The Fourth Edit. or in 8 Vols. 8vo. 4*l.* 14*s.* 6*d.*

"We are of opinion, that it requires nothing more than a notice, to bring this very meritorious publication into general circulation."—*Edinb. Review*, No. 71.

MEMOIRS of ELIZABETH STUART, QUEEN of BOHEMIA, Daughter of King James I.; with Sketches of the most distinguished personages, and the state of Society in Holland and Germany, during the 17th Century. By Miss BENGER. In 2 Vols. post 8vo. 1*l.* 4*s.* Bds.

By the same Author,

MEMOIRS of MARY, QUEEN of SCOTS, with Anecdotes of the Court of HENRY the SECOND, during her Residence in France. In 2 Vols. 8vo. with a genuine Portrait, never before engraved. Price 1*l.* 4*s.* Bds. 2d Edit.

MEMOIRS of the LIFE of ANNE BOLEYN, Queen of Henry VIII. 2d Edit. in 2 Vols. with 2 Portraits, 16*s.*

MEMOIRS of the COURT of HENRY the EIGHTH. By Mrs. A. T. THOMSON. In 2 Vols. 8vo. with a Portrait. Price 1*l.* 8*s.* Bds.

"Mrs. Thomson appears to have entered on her undertaking fearlessly and industriously, and she may certainly be declared to have performed it with ability."—*Monthly Review*, *June* 1826.

MEMOIRS of the COURT of QUEEN ELIZABETH. By LUCY AIKIN. 6th Edit. 2 Vols. 8vo. 1*l.* 5*s.* Bds.

MEMOIRS of the COURT of KING JAMES the FIRST. By LUCY AIKIN.. 2 Vols. 8vo. 3d Edit. 1*l.* 4*s.* Bds.

The HISTORY of the REIGN of GEORGE the THIRD By ROBERT BISSET, L.L.D. Author of the Life of Burke, &c. &c. A new Edition, completed to the Death of the King, in 6 Vols. 8vo. Price 3*l.* 3*s.* Bds.

The PRIVATE and CONFIDENTIAL CORRESPONDENCE of CHARLES TALBOT, Duke of SHREWSBURY, principal Minister to King William, for a considerable Period of his Reign. In 4to., with a Portrait of the Duke of Shrewsbury, from an original Painting by Sir Peter Lely. Price *3l.* 3*s.* Bds.

HISTORY of the HOUSE of AUSTRIA, from the Foundation of the Monarchy, by Rhodolph of Hapsburg, to the death of Leopold the Second, 1218 to 1792. 5 Vols. 8vo. Price *3l.* 13*s.* 6*d.* Bds.

MEMOIRS of the LIFE and ADMINISTRATION of Sir ROBERT WALPOLE, Earl of Orford, drawn from Original Correspondence and Authentic Papers, never before published. In 4 Vols. 8vo. *2l.* 8*s.* Bds.

MEMOIRS of the KINGS of SPAIN of the HOUSE of BOURBON, from the Accession of Philip the Fifth to the Death of Charles the Third, 1700—1788, from Original Documents, and Secret Papers, many of which have never before been published. The 2d Edition. In 5 Vols. 8vo. *3l.* in Bds. A few Copies in 3 Vols. Imp. 4to. 12*l.* 12*s.* Bds.

The HISTORY of the REIGN of HENRY the EIGHTH; comprising the Political History of the Commencement of the English Reformation: being the First Part of the Modern History of England. By SHARON TURNER, F.S.A. R.A.L. 2d Edit. In 2 Vols. 8vo. Price *1l.* 6*s.* Bds.

By the same Author,

The HISTORY of the ANGLO-SAXONS; comprising the History of England from the earliest Period to the Norman Conquest. 3 Vols. 8vo. 4th Edit. *2l.* 5*s.* Bds.

The HISTORY of ENGLAND, during the MIDDLE AGES; comprising the Reigns from William the Conqueror to the Accession of Henry VIII., and also the HISTORY of the LITERATURE, POETRY, RELIGION, the PROGRESS to the REFORMATION, and the LANGUAGE of ENGLAND during that Period. 2d Edition, 5 Vols. 8vo. Price *3l.* Bds.

The above Volumes together contain the complete HISTORY of ENGLAND, from the earliest Period to the Death of Henry VIII. in 10 Vols. 8vo. Price 6*l.* 11*s.*

The HISTORY of the RISE and PROGRESS of ish
UNITED STATES of NORTH AMERICA, till the Britds.
Revolution in 1688. In 2 Vols. 8vo. Price 1*l.* 8*s.* B
By JAMES GRAHAME, Esq.

A HISTORY of IRELAND. By JOHN O'DRISCOL. In 2 vols. 8vo. Price 1*l.* 4*s.* Bds.

This work contains a rapid sketch of the earlier periods of Irish History, and presents a new and more complete view than has yet been published of the important events of the Revolution.

A HISTORY of the MAHRATTAS. By JAMES GRANT DUFF, Esq. Captain 1st, or Grenadier Regiment of Bombay Native Infantry, and late Political Resident at Satara. In 3 Vols. 8vo. with Plates, and a Map of the Mahratta country, chiefly from original and recent Surveys; also a Map of India, showing the ancient Divisions of the Deccan. Price 2*l.* 15*s.* Boards.

Besides the Records of the Mahratta Governments of Poonah and Satara, and those of the English East India Company, the Authorities for this Work are from a great Variety of authentic Sources, hitherto inaccessible to the Public.

The LIFE of NAPOLEON BUONAPARTE, Emperor of the French; with a PRELIMINARY VIEW OF THE FRENCH REVOLUTION. By the Author of "Waverley," &c. In 9 Vols. post 8vo. Price 4*l.* 14*s.* 6*d.* Bds.

PHILOSOPHY in SPORT made SCIENCE in EARNEST; being an Attempt to illustrate the First Principles of Natural Philosophy by the Aid of Popular Toys and Sports. 3 Vols. 12mo. With Engravings on Wood from Designs by George Cruikshank. Price 1*l.* 1*s.* Bds.

This day is published, in 8vo. price 15*s*.

THE ANNUAL BIOGRAPHY and OBITUARY for the Year 1828 — containing Memoirs of celebrated Persons who died in 1826-27.

CONTENTS: — H.R.H. the Duke of York, the Marquis of Hastings, the Right Hon. George Canning, Lord De Tabley, William Gifford, Esq. John Flaxman, Esq. Charles Mills, Esq. Philip Rundell, Esq. Miss Benger, John Nichols, Esq. Archdeacon Daubeny, Dr. Evans, Signor Ugo Foscolo, Mr. Thomas Holloway, Dr. Kitchener, &c. &c.; with a general Biographical Index.

*** Also may be had, the preceding Eleven Volumes, 15*s*. each; and purchasers are requested to complete their Sets, as some of the Volumes are nearly out of print.

The EDINBURGH GAZETTEER, or GEOGRAPHICAL DICTIONARY, brought down to 1827: containing a Description of the various Countries, Kingdoms, States, Cities, Towns, &c. of the World. With an ADDENDA, containing the present State of the New Governments in South America; the Burmese Empire; a Summary of the recent Voyages and Travels in the East, North America, and in Africa. In 6 large Vols. 5*l*. 8*s*. Bds.

As an accompaniment to the above, may be had,

A NEW GENERAL ATLAS, constructed by A. ARROWSMITH, Hydrographer to the King, from the latest Authorities; exhibiting the Boundaries and Divisions, also the Chains of Mountains, and other Geographical Features of all the known Countries in the World; comprehended in Fifty-four Maps, including Two New Maps from Original Drawings, with the recent Discoveries of Ross, PARRY, FRANKLIN, &c. in North America. Engraved in the best style of the Art. In royal 4to. Price 1*l*. 16*s*. half-bound, or with the Boundaries, &c. coloured, 2*l*. 12*s*. 6*d*.

00027631

Digitized with financial assistance from the
Government of Maharashtra
on 02 January, 2016